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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1916

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES

OF THE

SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.

“ “ JAMES THOMPSON GARROW, J.A.*

“ “ JOHN JAMES MACLAREN, J.A.

“ “ JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

Second Divisional Court.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P.

“ “ WILLIAM RENWICK RIDDELL, J.

“ “ HAUGHTON LENNOX, J.

“ “ JAMES LEITCH, J.

“ “ CORNELIUS ARTHUR MASTEN, J.

HIGH COURT DIVISION.

THE HON. SIR JOHN ALEXANDER BOYD, K.C.M.G., C.†

“ “ SIR GLENHOLME FALCONBRIDGE, C.J.K.B.

“ “ SIR WILLIAM MULOCK, K.C.M.G., C.J.Ex.

“ “ BYRON MOFFATT BRITTON, J.

“ “ ROGER CONGER CLUTE, J.

“ “ FRANCIS ROBERT LATCHFORD, J.

“ “ ROBERT FRANKLIN SUTHERLAND, J.

“ “ WILLIAM EDWARD MIDDLETON, J.

“ “ HUGH THOMAS KELLY, J.

* Mr. Justice Garrow died on the 31st August, 1916.

† The Chancellor died on the 23rd November, 1916.

ERRATA.

Page 71, last line, for "Zirenberg" read "Zierenberg."

Pages 185 to 196 inclusive, in the side-note on each page, for "Riddell, J." read "Masten, J."

Page 483, head-note, third line from bottom, for "the estate, real and personal," read "the personal estate and the New Jersey real estate."

Page 521, 12th line from top, for [1904] read [1894].

MEMORANDA

APPOINTMENTS TO THE BENCH.

On the 4th December, 1916, William Nassau Ferguson, of the City of Toronto, in the Province of Ontario, Esquire, one of His Majesty's Counsel learned in the law for the said Province, was appointed a Judge of the Supreme Court of Ontario and a member of the Appellate Division of the said Court and *ex officio* a member of the High Court Division of the said Court, in the room and stead of the Honourable James Thompson Garrow, deceased.

On the same day, Hugh Edward Rose, of the City of Toronto, in the Province of Ontario, Esquire, one of His Majesty's Counsel learned in the law for the said Province, was appointed a Judge of the Supreme Court of Ontario and a member of the High Court Division of the said Court, in the room and stead of the Honourable Sir John Alexander Boyd, deceased.

CALL TO THE BAR.

19TH OCTOBER, 1916:

Charles Patrick Wilson, Simon James McLean, Harry Sutherland Sprague, Henry Sidney Hamilton, Appolos Bamber Kerr, William Menton, Harold Fearn Logan, John Wesley Fletcher Kerr.

23RD NOVEMBER, 1916:

Stanley Metcalfe Clark (with honours), Marcus Smith, Donald Ross Hossack, Charles Howard Tanner.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

1916

ADAMS V. GLEN FALLS INSURANCE CO.

Feb. 10.
April 19.

Fire Insurance—Stock in Trade—Proofs of Loss—Sufficiency—Absence of Objection—Refusal to Pay Claim—Proof of Value of Goods Insured—Proof of Damage—Extent of Damage—Fraud or False Statement in Statutory Declaration—Evidence—Onus—Statutory Conditions 19 and 20, R.S.O. 1914, ch. 183, sec. 194—Stock-taking—Excessive Estimate of Damage—Insurance on Household Furniture and Building—Findings of Fact of Trial Judge—Appeal.

The plaintiff, having effected with the defendants insurances against fire upon his stock in trade, household furniture, and building used as a store and dwelling-house, and damage having been done (as he alleged) by smoke from a fire in an adjacent building, brought this action to recover the amount of his loss.

The plaintiff delivered to the defendants proofs of loss, which were objected to by the defendants as being insufficient, and were supplemented by the plaintiff by the delivery of a statutory declaration exhibiting a copy of a stock-sheet dated the 5th February, a few days before the fire. These were sent to the defendants in a letter in which it was said, "If there is anything further you require you might let me know." No answer was made to this inquiry, and no further complaint was made as to the sufficiency of the proofs:—

Held, that it was not open to the defendants to set up the insufficiency of the proofs, if indeed it was open to them to object to the proofs when they had definitely rejected and refused to pay the plaintiff's claim or any part of it.

Morrow v. Lancashire Insurance Co. (1898-9), 29 O.R. 377, 26 A.R. 173, referred to.

- (2) That, upon the evidence, the plaintiff had proved that the stock in the store at the time of the fire was of the value stated in the stock-sheet, about \$14,000.
- (3) That, upon the evidence, the stock was damaged by smoke.
- (4) That the extent of the damage was \$2,000.
- (5) That the claim of the plaintiff was not vitiated by fraud or false statements in his declaration as to the matters mentioned in statutory condition 18 under sec. 194 of the Insurance Act, R.S.O. 1914, ch. 183. The onus of proving fraud or false statements was upon the defendants, and there must be clear and satisfactory proof. According to the provisions of the 20th statutory condition, the fraud or false statement must be in a statutory declaration in relation to the particulars mentioned in the 18th condition. In none of the declarations furnished was there any statement that there

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had been a stock-taking on the 5th February and that the list exhibited shewed the result of it; and it was unimportant, so far as the question of the application of the 20th statutory condition was concerned, whether or not there was in fact any stock-taking. It was satisfactorily shewn, however, that stock had been taken on the 4th and 5th February and that the stock-list exhibited was the result of it.

(6) That the estimate made by the plaintiff of the damage that had been done to the stock by smoke was an excessive one, but not so excessive as to justify the conclusion that it was dishonestly and fraudulently made. To justify such a finding, the evidence ought, if not such as would warrant a conviction for fraud and perjury, to be at least clear and satisfactory, and to leave no room for any reasonable inference but that of guilt.

Rice v. Provincial Insurance Co. (1858), 7 U.C.C.P. 548, *Park v. Phœnix Insurance Co.* (1859), 19 U.C.R. 110, and *Parsons v. Citizens' Insurance Co.* (1878), 43 U.C.R. 261, followed.

(7) That the plaintiff was therefore entitled to recover in respect of damage to the stock and also in respect of damage to the household furniture and building.

Judgment of SUTHERLAND, J., reversed.

ACTION against three insurance companies, the Glen Falls Insurance Company, the Imperial Underwriters Corporation of Canada, and the Metropolitan Fire Insurance Company, upon policies issued by these companies, insuring the plaintiff against fire in respect of his stock in trade as a dealer in clothing and other articles, his household furniture, and the building, used as a store and dwelling-house, in which they were contained, in the town of North Bay.

On the night of the 11th February, 1915, a fire occurred in the store adjoining the plaintiff's, and some damage was done by smoke to his property. This action was brought to recover the proportion of the plaintiff's loss thus sustained for which the defendants were, as he alleged, liable.

December 6 and 7, 1915. The action was tried by SUTHERLAND, J., without a jury, at North Bay.

G. H. Kilmer, K.C., and G. A. McGaughey, for the plaintiff.
Leighton McCarthy, K.C., for the defendants.

February 10, 1916. SUTHERLAND, J. (after stating the facts):—Upon the evidence at the trial, I was not convinced that there was the quantity of stock in the plaintiff's store at the time of the fire that he stated there was; and I formed the definite opinion, which I expressed during the argument, that, if there had been any appreciable damage to his stock by smoke, it was greatly and deliberately exaggerated in the claim made.

It is very unfortunate that the plaintiff, with the experience he had with previous fires and his knowledge that a separation of the damaged from the undamaged goods would naturally and properly be expected, did not immediately after the fire make up in detail a list of the goods alleged to be damaged. Had it not been for the fact that he apparently brought in no distinct or definite way to the knowledge of the representatives of the insurance companies, immediately after the fire, that he was claiming a large damage to his goods, it is obvious that they would have taken some pains to ascertain the particulars of such alleged damage. The plaintiff called so little attention to his claim in this respect that they were put off their guard and misled thereby.

Under statutory condition 18 in the Insurance Act, R.S.O. 1914, ch. 183, sec. 194, it is incumbent upon an assured: (a) forthwith after loss to give notice in writing to the company; (b) to deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits; and (c) furnish therewith a statutory declaration declaring that the account is just and true; and condition 20 is to the following effect: "Any fraud or false statement in any statutory declaration, in relation to any of the above particulars, shall vitiate the claim of the person making the declaration."

Upon the facts before me in evidence, I am quite unable to believe that the plaintiff, with reference to his claim for damage to his goods, gave as particular an account of the loss as the nature of the case permitted.

In his first declaration under date the 17th March, 1915, he put his claim in this respect as follows: "3. That I estimate that I have suffered loss to the extent of \$2,900, made on a basis of 20 per cent. of the value of my stock, which is \$14,500."

No details as to the kind of goods damaged were given, and an estimate of 20 per cent. of the value of the stock was a manifestly absurd and inadequate presentation of the claim.

On receiving the declarations of the 17th March, the solicitor for the defendants wrote letters to the plaintiff's solicitors demanding further and better proofs of loss and a more particular account thereof, and pointing out errors in the alleged facts set forth in the declaration. Thereupon the second declaration of the 17th April was made by the plaintiff. To this was attached

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a copy of the alleged stock-sheet and varying percentages of loss on the different kinds of goods.

It seems to me absurd to say that a statement to the effect that all of a certain lot of "pants," suits, underwear, and overcoats were damaged to the extent of 40 per cent. and other classes of goods to the extent of 30, 20, 10, and 5 per cent., is furnishing and delivering as particular an account of the alleged loss as the nature of the case would permit and as would be reasonable to expect. The manner in which the plaintiff has presented his claim indicates either a complete inability, from any statements or facts in his possession, to make up a reasonably accurate and detailed statement—and in consequence his estimate is an unsafe and unreliable one—or, more likely, as I think and find, a deliberate attempt to prepare and present a grossly exaggerated claim. I cannot believe that the plaintiff's goods were damaged to any such extent as he claims, or to any considerable extent at all. I believe that he was well aware of this when he made the declarations referred to. I cannot believe that the statement made in the second declaration to the effect that the claim of loss therein is a just, true, and correct claim for the loss sustained by him, is a true statement, or that he believed it was at the time he made the declaration.

The plaintiff also made a claim for \$150 loss to the furniture. No particulars of this were at any time furnished to the defendants, and no satisfactory details given, even in the evidence on behalf of the plaintiff at the trial. In his first declaration the plaintiff claimed a loss of \$250 on buildings. Notwithstanding that fact, on the 31st March he signed a statement addressed to the Scottish Union and National Insurance Company, one of the two companies having insurance on the buildings, in which he sets out his alleged loss with respect to the buildings in question as follows:—

Statement of value and loss thereon.	Total Amount of Insurance.	Amount Insured.	Amount Paid.
To cleaning of discoloured ceiling, shelving, and windows, and painting of same. \$22.00	Scottish Union & National.. Concurrent Ins.	\$1,000.00 2,000.00	\$ 7.33 14.67
	Total.	\$3,000.00	\$22.00

And makes a claim in the following terms: "In accordance with the foregoing, I claim \$7.33 as your share of the loss"—signing the same as claimant. On the 7th April, 1915, he was paid the said sum of \$7.33 by cheque of the Scottish Union and National Insurance Company.

In his statement of claim filed in this action on the 2nd November, 1915, he puts his claim for damages in respect to buildings at \$150. At the trial it appeared that part of this amount so claimed was really with reference to repairs done in consequence of the roof leaking, and having nothing at all to do with the fire in question.

Under these circumstances and upon these findings, the result must follow as indicated in the statute, sec. 194, condition 20, that the claim of the plaintiff is vitiated, and his action fails.

It will therefore be dismissed with costs.

The plaintiff appealed from the judgment of SUTHERLAND, J.

April 6 and 7. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Kilmer, K.C., for the appellant. The learned trial Judge erred in his findings against the appellant. The respondents were not put off their guard by any representations as to loss made to them by the appellant; the appellant made no attempt to present a grossly exaggerated claim; the appellant's statement as to the quantity of stock in his store at the time of the fire was truthful. As to the last matter, the estimate of the appellant was not contradicted by any evidence on the part of the respondents. There was abundant evidence that the stock was damaged by smoke. The appellant's pointing to the ceiling was to shew that, if the ceiling was so damaged, the stock would naturally be damaged also. Nor was this smoke damage exaggerated. The appellant did take stock, not as well as a better business man might, but there was no fraud about it, and exhibit 22 was the result of it. According to the provisions of the 20th statutory condition, the fraud or false statement must be in a statutory declaration in relation to the particulars mentioned in the 18th condition. Neither of the declarations furnished by the appellant stated that there had been a stock-taking on the 5th

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February and exhibit A shewed the result of it. Exhibit A is a detailed statement of loss. So that it really does not matter whether there was a stock-taking or not: *Ross v. Commercial Union Assurance Co. of London* (1867), 26 U.C.R. 552. There is no foundation, then, for the finding that the whole story as to the stock-taking was invented in order that the appellant might support a dishonest claim against the respondents. The claims for damage to the furniture and building should be allowed.

Leighton McCarthy, K.C., for the defendants, respondents. The findings of the learned trial Judge against the appellant are amply borne out by the evidence. The appellant did not furnish proper proofs of loss; and the appellant, in the account of his loss which he did furnish, made false and fraudulent statements with reference to his claim, and, by virtue of the 20th statutory condition, his claim is vitiated: *Hiddle v. National Fire and Marine Insurance Co. of New Zealand*, [1896] A.C. 372; *Nixon v. Queen Insurance Co.* (1894), 23 S.C.R. 26.

Kilmer, in reply. The appellant asked the respondents if they wanted any further proofs of loss, but got no reply.

April 19. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 10th February, 1916, which was directed to be entered by Sutherland, J., after the trial of the action before him, sitting without a jury, at North Bay, on the 6th and 7th December, 1915.

The appellant carried on a general store at North Bay and lived above his shop, and the building belonged to him. On the 1st August, 1914, he effected an insurance with the respondents the Glen Falls Insurance Company on his stock in trade for \$3,000, and on the same day an insurance on it with the respondents the Imperial Underwriters Corporation of Canada for \$2,000, and on the 17th September, 1914, an insurance on it with the respondents the Metropolitan Fire Insurance Company for \$2,000. He also effected an insurance of \$500 on his household furniture and of \$1,000 on his building, on the 18th June, 1914, with the Glen Falls Insurance Company; on the 29th October, 1914, an insurance on his household furniture for \$600 with the Imperial Underwriters; and an insurance on his building for \$1,000 with the Scottish

Union and National Insurance Company. The last mentioned insurance is not, however, in question in the action.

On the 11th February, 1915, a fire occurred, which originated in a building adjoining that of the appellant, the result of which, as he alleges, was to do serious damage to his stock in trade and to his household furniture, and some damage to his building, and the action is brought to recover the proportion of the loss thus sustained for which the respondents, as he contends, are liable.

The claim is that the loss and damage to the stock in trade caused entirely by smoke was \$3,333.90; the loss and damage to the furniture caused in the same way \$150; and the loss and damage to the building \$250.

These claims are disputed by the respondents, and they also set up as defences to the action the failure of the appellant to furnish to them proper proofs of his loss, and that the appellant in an account of his loss which he did furnish made false and fraudulent statements with reference to his claim, by which, by virtue of the 20th statutory condition, his claim is vitiated. The statements of defence do not shew in what particulars the statements alleged to have been false and fraudulent were so, and no particulars appear to have been delivered.

The appellant on the 17th March, 1915, delivered to the three companies proofs of his loss. The proofs consisted of statutory declarations, in which he declared with respect to the stock in trade that he estimated that he had suffered loss to the extent of \$2,900, made up on the basis of 20 per cent. of the value of the stock, which he declared was \$14,500, and that the damage was caused by smoke spreading from the fire; and in which he declared, with respect to the building, that it was damaged to the extent of \$250, and, with respect to the household furniture, that it was damaged to the extent of \$150.

These proofs of loss were objected to by the respondents as being insufficient, and further proofs of loss were furnished on the 17th April following, and it is in them that the false and fraudulent statements are alleged to have been contained. These proofs were in the form of a statutory declaration of the appellant, in which he declared that he had made a detailed statement of the loss sustained on the different articles in his building, and had found that it was necessary for him to "supplement the loss"

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by claiming the sum of \$3,333.90, and with the declaration was delivered a statement marked exhibit A, which he said was a detailed statement shewing the loss he had sustained by the fire. This statement is headed "Copy of Stock-sheet, February 5th, 1915," and contains a detailed list of the various descriptions of articles of which the stock was composed, with their values set opposite, which aggregate \$14,150.60. In another column are set out the percentages of damage to the different articles, and in a third column the total amount of damage to them, based on these percentages.

This declaration and the statement were sent by the appellant's solicitors to the respondents' solicitors, and in the letter which accompanied them the writers say, "If there is anything further you require you might let me know." So far as I have been able to discover, no answer was made to this inquiry, and no further complaint was made as to the sufficiency of the proofs of loss that had been furnished. It was therefore not open to the respondents to set up the insufficiency of the proofs of loss, if indeed it was open to them to object to them when they had definitely rejected and refused to pay the appellant's claim or any part of it: *Morrow v. Lancashire Insurance Co.* (1898-9), 29 O.R. 377, 26 A.R. 173.

The question which lies at the threshold of the inquiry, both as to the amount of the loss and the alleged fraud and false statements, is, what was the value of the appellant's stock in trade at the time of the fire?

As to this the learned trial Judge says: "I was not convinced that there was the quantity of stock in the plaintiff's store at the time of the fire that he stated there was."

Assuming that that means that the appellant had not proved that the stock in the store at the time of the fire was of the value of \$14,000, not only is the finding not supported by the evidence, but is directly opposed to it.

That the stock in the store at the time of the fire was of that value was testified to by the appellant and his clerk, Abe Sturt, and there was also the evidence to the same effect of William Baldwin, an independent witness called by the appellant, and of Max Claver, a witness called by the respondents. Not a witness was called by the respondents to speak as to the value of the

stock, and it is most significant that neither McKeown, the agent of two of the companies, who took their risks, nor Cory, the adjuster, both of whom were called as witnesses by the respondents, was asked anything as to the quantity or value of the stock, and neither of them ventured to suggest that it was not worth what the appellant alleged was its value.

The question next in importance is, was the stock damaged by smoke?

The only answer to it that it is possible on the evidence to give is, that it was. There was adduced on the part of the appellant a large body of evidence to support his testimony that the store was filled with smoke; and against this there was only the testimony of McKeown that on the morning after the fire he did not detect the smell of smoke when he was in the plaintiff's shop; the testimony of a fireman named McNee, who said that he did not see any smoke when he went upstairs to the appellant's living-rooms; the testimony of the chief of the fire brigade, who said he was in the appellant's store three times, that on the first occasion there was not enough smoke to bother and that he did not see much smoke, that on the second occasion the smoke did not seem any worse, that there was smoke upstairs but not very much, and that on the third occasion the smoke had lifted; and the testimony of William Martin junior, who said that looking into the store he could see a slight haze around the lights.

Testimony such as this cannot outweigh the testimony of a witness who speaks of seeing a considerable smoke in the store, so dense that he was "afraid of there being fire there" (McIlvenna, the Mayor of North Bay); of Leonard W. Wilson, car inspector of the Canadian Pacific Railway Company and a member of the town council, who said that "on account of the smoke, although the lights were on in the store, you could not see the back part of the store, you could see the lights at the back, but you could not distinguish the back part of the store;" of William Prior, a carpenter and joiner, who was employed shortly after the fire to repair the furniture that was upstairs, and who said that it was "heavily smoked;" of John Carey, who says that the store was "full of smoke;" of Walter Wright, a fireman who went upstairs after the fire had progressed for some time and says that he "found considerable smoke there;" and of Henry Ritter, who says

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that about ten minutes after the fire began he went into the store for the purpose of telephoning—I infer for a doctor to see a servant girl who had been badly hurt in getting her out of the building in which the fire started—that the store was “thick with smoke,” so thick that he was unable to find the doctor’s number in the telephone-book, that he remained watching the fire until two o’clock in the morning, and during all the time he was there “there was more smoke in.”

The next question to be considered is, what was the extent of the damage done to the stock?

The view of the learned trial Judge was, that it was “very unfortunate that the plaintiff, with the experience he had with previous fires and his knowledge that a separation of the damaged from the undamaged goods would naturally and properly be expected, did not immediately after the fire make up in detail a list of the goods alleged to be damaged.”

It may be open to question whether the appellant was bound to do this; but, even if he was, the observation is, I think, scarcely fair to the appellant; he might well delay or omit doing this until a request to do it had been made by the respondents. The doing of it would have entailed a considerable interruption of his business and the expenditure of much time and labour; and in the case of the only previous fire in which the course suggested was said but not proved to have been adopted, it was not taken until the company had asked that it should be taken. The appellant may well have thought, and not unreasonably, that, as the damage was general, an estimate could be made of the loss by an inspection of the stock as it lay on the shelves and elsewhere in the store.

I differ also as to the insurance companies having been put off their guard and misled by the appellant’s action after the fire. A perusal of the evidence leads me to the conclusion that the agent McKeown knew from the first that the appellant claimed that his stock, furniture, and building had been damaged by smoke, though it is quite possible that McKeown thought that the claim would not be large.

Much was attempted to be made of the fact that in referring to the damage by smoke the appellant pointed to the ceiling, the contention being that this shewed that he was limiting his claim for damage by smoke to the building, and that he had then

no idea of making a claim for damage to anything else. That is not the inference I would draw from the incident. There had been a discussion as to the smoke, and the appellant in pointing to the ceiling did so to shew that there had been smoke in the building, and what he did was as much as to say: "You can see for yourself that there was smoke in the building; look at that ceiling; it was white before the fire." So also as to the request to McKeown to go upstairs. It meant, "Go up stairs with me and you will find there evidence that the building was filled with smoke."

However that may be, according to McKeown's own testimony he was told by the appellant as early as the 18th February that he claimed that his stock had been damaged—McKeown says to the extent of 8 per cent., but this is denied by the appellant. Knowing as McKeown did that the appellant intended to make a claim for a substantial amount for damage to his stock by smoke, the fault for the course which the learned trial Judge said should have been taken lies, in my judgment, not with the appellant, but with the insurance companies which McKeown represented. It is incomprehensible to me why the agent McKeown and the adjuster Cory did not take means to ascertain definitely whether the stock really had been damaged by smoke, and, if so, to what extent it was damaged. They knew early that the appellant claimed that it had been damaged, and the building bore evidence of smoke in considerable quantity having been in it, yet they did nothing beyond entering the store and concluding, without having made any examination of the stock, that it had not been damaged.

The view of the learned trial Judge was that, "if there had been any appreciable damage to his" (the plaintiff's) "stock by smoke, it was greatly and deliberately exaggerated in the claim made." With that view I cannot agree. Acting as a juror, I cannot but conclude that a stock such as the appellant had in his store, when subjected to the action of a dense smoke for several hours, and especially the articles that were light in colour, would in all probability have been damaged by the smoke. This must have been the view of the respondents themselves, otherwise there would not have been the strenuous effort that was made to shew that there had been little or no smoke in the store. The testimony of the appellant as to the damage was corroborated by Sturt, and

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to some extent also by the witness Baldwin, who saw the stock very shortly after the fire, and testified that, "taking a rough estimate of it," the damage was between \$3,000 and \$4,000, and that the damage to the clothing, to which his attention was specially directed, was about 50 per cent., which is 10 per cent. more than the appellant's estimate.

After the best consideration that I have been able to give to the matter, my conclusion is that \$2,000 would not be an unreasonable sum at which to fix the damage to the stock; and the appellant is, in my opinion, entitled to recover that sum, to be apportioned of course among the respondents according to the amount of their respective policies, unless the claim of the appellant is vitiated by reason of fraud or false statements in his declaration as to the matters mentioned in the 19th statutory condition. The onus of proving the fraud or false statement alleged to have been made was upon the respondents, and mere suspicion, or even grave suspicion, is not enough. There must be clear and satisfactory proof.

It was strenuously argued by counsel for the respondents that what purported to be a statement of a stock-taking on the 5th February, 1915, was a document fabricated after the fire, and that there had been no stock-taking at that time. It was contended that it was established that when the respondents' solicitor, Mr. McCarthy, and Mr. Cory, the adjuster, were in North Bay in November, 1915, for the purpose of the examination for discovery of the appellant, Cory found among the papers which were produced to him by the appellant, preparatory to his examination for discovery, a document which purported to shew the result of a stock-taking on the previous 5th February, and the percentages of loss on the various classes of goods then in stock; that this document shewed on its face that alterations had been made in the original figures in three or four places; that it was taken out of a bundle of papers the appellant was asked to produce at his examination, by the appellant, and was not produced at the examination or since, and that the appellant produced at the trial a document (exhibit 22) which was not, although he testified it was, the document which Cory had seen, in which it is said the alterations appeared.

What motive the appellant could have had for inventing the

story as to the stock-taking and fabricating the stock-list I cannot conceive, if, as I have concluded, he had stock on hand of the value of \$14,000. I could understand his having a motive if the respondents had been able to shew that the value of the stock on hand was much less than that.

According to the testimony of Cory, alterations had been made in the values in four places in the stock-list which he found among the papers handed to him by the appellant. The only alteration he recollected was in the item of underwear, the value of which he said had been changed from \$1,272 to \$1,372. When shewn exhibit 22, he said it was not the stock-list he had seen; and, when asked as to whether it had a heading, his answer was that he "did not remember whether it had this exact heading." This stock-list had been taken by Cory to Mr. McCarthy. McCarthy testified, referring to the alteration which Cory said he remembered, that it looked as if the figures had been written up \$800 or \$900; he also said that the top of the sheet had been cut off, as in exhibit 22, and that percentages were shewn as in that exhibit, but that a line had not been run through them, and there was no second column of percentages as shewn in it. He also made the statement that the document "indicated that a person was figuring on his percentages and adjusting his values to get his proper summation or total."

I fail to understand how any such thing can have been indicated by the stock-list. It contained no statement of what the damage was, beyond giving the percentages, and there was no summation or total shewn. What possible difference, then, could it have made, as far as the document was concerned, whether the values were more or less than they were stated to be in the stock-list as it was written before the alterations? It is worthy of observation that the propounding of this theory was left to Mr. McCarthy, and was not fathered or supported by Mr. Cory.

It is unfortunate that, having, as they evidently thought they had, found an important piece of evidence which more than threw doubt upon the honesty of the appellant's claim, neither Mr. McCarthy nor Mr. Cory took the precaution of making a facsimile of the incriminating document, but left the question of what it contained and shewed, to be determined by their recollections of what they had seen. What I have said is, I think, em-

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phasised by the fact that, as has been seen, their recollections do not correspond.

Assuming all that was said by Mr. McCarthy and Mr. Cory, except the theory propounded by the former, to be true—and they, no doubt, stated the facts according to their recollections of them—I fail to see the importance of this as affecting the issue to be determined. It may be, unless Mr. McCarthy's theory ought to be accepted, that changes were made at the time the stock-list was written—indeed, there is nothing to shew the contrary—and that the appellant, fearing the fact that the alterations which had been made would be used against him as they are being used, decided to substitute for the document that Mr. Cory had found a clean copy of it which would not shew the alterations. This was, no doubt, an improper thing for him to have done, but the doing of it affords no ground for vitiating his claim.

According to the provisions of the 20th statutory condition, the fraud or false statement must be in a statutory declaration in relation to the particulars mentioned in the 18th condition. Neither in the declarations furnished in March, nor in the declaration furnished in April, is there any statement that there had been a stock-taking on the 5th February and that exhibit A shewed the result of it. All that the two documents, taken together, mean, when fairly read, is that exhibit A, as the declaration states, "is a detailed statement shewing the loss sustained by me in the said fire."

If this view is correct, it is unimportant, as far as the question of the application of the 20th statutory condition is concerned, whether or not there was in fact any stock-taking. See *Ross v. Commercial Union Assurance Co. of London*, 26 U.C.R. 552. I am, however, of opinion that it was satisfactorily shewn that stock had been taken on the 4th and 5th February and that the stock-list, exhibit 22, was the result of it.

I cannot understand why it should be necessary to reach the conclusion that there was no stock-taking and that the stock-list was fabricated after the fire. While it is true that the stock was not taken as it would be taken in a well-conducted business establishment, it must be remembered that neither the appellant nor Sturt was an experienced business man, and that they went about the work in the way that seemed to them most convenient

to enable the appellant to find out the value of the stock, and in the way in which, according to their testimony, the work had been done in the previous year. It is difficult for me to believe, and I do not believe, that the whole story as to the stock-taking was an invention designed to enable the appellant to support a dishonest and fraudulent claim against the respondents. It was urged that the slips upon which Sturt said he made his memoranda and handed to the appellant in order that he might make out the stock-list, should have been produced, and that the absence of them was a circumstance that pointed strongly to the conclusion that there never was a stock-taking. I do not think so. On the contrary, I think it was a most natural thing to destroy the rough memoranda after they had answered the purpose for which they were made.

In what particular, then, were there fraud and false statements in the declarations? If at all only in the statement as to the amount of damage done to the stock.

I apprehend that it must always be difficult to determine accurately the extent of the damage that smoke has caused to such a stock as the appellant had, and opinions would naturally differ, and differ perhaps widely, as to it.

As I have already said, the probabilities are altogether in favour of the view that, if there was as much smoke in the store as the appellant and the witnesses called on his behalf testified there was, the stock, and particularly the articles that were light in colour, would have been damaged, and I think seriously damaged. Besides the oaths of the appellant and Sturt, there is the evidence of Baldwin, to which I have referred, which corroborates them to some extent at least; and the evidence to the contrary is not satisfactory. It is entirely of persons, and few of them, who either formed their conclusion upon the hypothesis that there had been little or no smoke in the store, or upon that and a very cursory look at the stock. Indeed, the learned trial Judge's finding that the respondents were put off their guard and misled by the action of the appellant is designed to meet the contention that there was an absence of evidence on the part of the respondents to answer the case made by the appellant as to the damage done by the smoke, and the extent of it.

I do not mean to say that the estimate made by the appellant

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of the damage that had been done to the stock by smoke was not an excessive estimate, but I do not think that it was so excessive as to justify the conclusion that it was dishonestly and fraudulently made. Such a finding ought not to be made unless his estimate is so extravagant as to lead necessarily to the conclusion that the excessiveness was due not to an error of judgment, but was motivated by an intention to defraud. It is a very serious thing to find a man guilty of fraud and perjury; and, to justify such a finding, the evidence ought, if not such as would warrant a conviction for fraud and perjury, to be at least clear and satisfactory, and to leave no room for any reasonable inference but that of guilt. As to this, I refer to *Rice v. Provincial Insurance Co.* (1858), 7 U.C.C.P. 548; *Park v. Phoenix Insurance Co.* (1859), 19 U.C.R. 110; and *Parsons v. Citizens' Insurance Co.* (1878), 43 U.C.R. 261.

I am, for these reasons, of opinion that the defence founded on the 20th statutory condition was not made out.

There remains to be considered the claims for damage to the household furniture and to the building. There were two policies covering the household furniture, one of the Imperial Underwriters for \$600, and the other of the Glen Falls Insurance Company for \$500, and the appellant's estimate of his loss was \$150. This claim was supported by the testimony of the witness William Prior, who said that the damage to the furniture was \$175, and there was no evidence to the contrary except that as to there having been little or no smoke upstairs, with which I have dealt. The learned trial Judge appears to have overlooked this claim, and the appellant should have judgment for the amount of it against the two insuring companies, in the proportions of five-elevenths against the Glen Falls Insurance Company and six-elevenths against the Imperial Underwriters.

As I have already mentioned, the building was insured in the Glen Falls Insurance Company for \$1,500, and in the Scottish Union and National Insurance Company for \$1,000. The claim for damage to it is \$250.

The appellant appears to have thought that damage had been done by water thrown on the building having leaked through the roof, and made his claim under that impression. It turned out that this was a mistake, or that the Scottish Union satisfied him

that it was a mistake, and he settled with that company on the footing that damage to the amount of \$22 only had been done. This sum probably, although the evidence is not clear as to it, represented what the appellant had paid the witness Wallburn for repairs, consisting of re-painting and re-decorating, and putting in some glass that had been broken.

I do not think that the appellant is entitled to recover more than the Glen Falls Insurance Company's proportion of \$22. The other company appears to have got the better of the appellant in the settlement with him, as they paid on the basis of the building being insured for \$3,000, when, as far as appears in the evidence, it was insured for only \$2,500. I do not think that there was fraud or false statement with respect to this claim; but, if there were, it would affect only the right to recovery on the Glen Falls policy on the building. The proportion of the loss on the building which that company should pay I would fix at fifteen twenty-fifths of \$22—\$13.20.

I would, for the reasons I have given, allow the appeal with costs, reverse the judgment, and direct that judgment be entered for the appellant in accordance with the opinion as to his rights which I have expressed, with costs throughout.

Appeal allowed.

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Water—Rights of Lumbermen Floating Logs in Navigable River—Injury to Dam—"Unnecessary Damage"—Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 4—Negligence—Damages—Reference—Costs.

The judgment of MIDDLETON J., 34 O.L.R. 204, was reversed; GARROW and MACLAREN, JJ.A., dissenting; and the plaintiffs were *held*, entitled to recover the damages sustained by them owing the destruction of their coffer-dam by the defendant's logs.

Per MEREDITH, C.J.O.:—The plaintiffs' dam was lawfully constructed and maintained under the authority of the Dominion Parliament, in the exercise of its exclusive authority to make laws with respect to navigation, for the purpose of improving navigation; and the defendant was bound to exercise his rights under the Rivers and Streams Act so as not, at all events unnecessarily, to destroy or injure the dam. The rights conferred by the Act were subordinate to the right to maintain the dam; and the provisions of sec. 4 could not cut down or impair that paramount right. The damage that was done was an unnecessary damage within the meaning of that section.

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Per HODGINS, J.A.:—The statute includes damage unnecessarily caused during the normal and usual process of driving, as well as that which arises, though inevitably, from a method of operation originally improper, unnecessary, or negligent.

Per GARROW, J.A.:—It was not the defendant's duty to protect the plaintiffs' dam against the ordinary consequences of floating logs down the stream in the customary way. The defendant could not be made liable for the injury to the dam unless the plaintiffs proved negligence in the management of the drive, and that they failed to do.

AN appeal by the plaintiffs from the judgment of MIDDLETON, J., 34 O.L.R. 204.

March 22 and 23. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

R. McKay, K.C., for the appellants, referred to *James v. Rathbun Co.* (1905), 11 O.L.R. 271; *Thompson v. Hill* (1870), L.R. 5 C.P. 564, 566; *Caldwell v. McLaren* (1884), 9 App. Cas. 392; *Davies v. City of London Corporation*, [1913] 1 Ch. 415; *J. L. Denman & Co. Limited v. Westminster Corporation*, [1906] 1 Ch. 464, 478; *Hewson v. Ontario Power Co. of Niagara Falls* (1905), 36 S.C.R. 596; *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario Quebec and Nova Scotia*, [1898] A.C. 700, 717 (*Fisheries Case*); *Canadian Pacific R.W. Co. v. Corporation of Nôtre Dame de Bonsecours*, [1899] A.C. 367.

W. N. Tilley, K.C., and *Wentworth Greene*, for the defendant, the respondent, referred to the *James* case, *supra*, and contended that the damage done to the coffer-dam was not an "unnecessary damage" within the meaning of sec. 4 of the Rivers and Streams Act, R.S.O. 1914, ch. 130.

J. R. Cartwright, K.C., appeared for the Attorney-General for Ontario.

McKay, in reply.

April 19. MEREDITH, C.J.O.:—If, as I think may reasonably be found on the evidence, the appellants' coffer-dam was lawfully constructed and maintained under the authority of the Dominion Parliament for the purpose of improving navigation, either in the Montreal river or below that river, by the creation of a storage-dam to conserve the head-waters, the respondent was, in my opinion, bound to exercise his rights under the Rivers and Streams Act so as not, at all events unnecessarily, to destroy or injure the coffer-dam.

That the coffer-dam was there, the foreman knew or ought to have known, and yet no precautions were taken by him to prevent injury being done to it in carrying on the operations which he was directing and superintending, but he went on with them just as if the coffer-dam was not in existence.

It may be and perhaps is the fact that the formation of side-jams is a step usually taken in driving logs, but it is clear that the logs might have been brought down without that being done, though only by the expenditure of more money and time, and with the risk of the water getting so low as to impede the floating of the logs and the possibility that they could not have been brought down during the spring freshet, which was then on.

The respondent was, I think, bound to take these risks, if he knew or ought to have known that there would be danger of the coffer-dam being destroyed or seriously injured if the driving were done in the manner in which it was done, and the damage that was done was therefore an unnecessary damage within the meaning of sec. 4 of the Rivers and Streams Act.

If I am right in the view that the coffer-dam was lawfully where it was, and was placed there under the authority of the Parliament of Canada, in the exercise of its exclusive authority to make laws with respect to navigation, the rights conferred by the Rivers and Streams Act were, in my opinion, subordinate to the right to maintain the coffer-dam; and the provision of sec. 4 of the Rivers and Streams Act as to the dam or other structure being provided with "a convenient apron, slide, gate, lock or opening . . . for the passage of timber, rafts and crafts authorised to be floated down the river," cannot cut down or impair the paramount right to maintain the coffer-dam.

I would, therefore, allow the appeal, and substitute for the judgment which has been directed to be entered, judgment for the plaintiffs to recover the damages sustained by them owing to the destruction by the respondent's logs of the coffer-dam, with costs. If the parties are unable to agree as to the amount of the damages, there must be a reference to ascertain them, and in that event the question of the costs of the reference and of subsequent costs will be reserved to be dealt with on further directions.

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HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice. Forgetfulness of the existence of the coffer-dam, when he first went to see the rapids, may be credited to Ferguson, but he knew of it and saw it before the jam across finally formed, and decided to let things go on. His attitude is expressed at the close of his evidence in this way: "I did not think it was anything of my business to attend to their property there or their boom."

If liability for the damage is to be tested by the expression in the statute "doing no unnecessary damage," then I should be disposed to view the effect of that phrase as more comprehensive than is indicated in the cases cited in the judgment below.

The fact that damage may be the necessary consequence of an act does not determine the character of that act, which may be due to negligence or done with careful intent.

The statute, I think, includes damage unnecessarily caused during the normal and usual process of driving, as well as that which arises, though inevitably, from a method of operation originally improper, unnecessary, or negligent.

The respondent may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

GARROW, J.A.:—Appeal by the plaintiffs from the judgment at the trial before Middleton, J., without a jury, dismissing the action.

The case is reported in 34 O.L.R. 204, where the facts appear.

The defendant's right as a lumberman, derived under the provisions of the Rivers and Streams Act, R.S.O. 1914, ch. 130, to use the river at the time and for the purpose for which he was using it when the injury to the plaintiffs' coffer-dam is said to have occurred, is not questioned.

That right, however, seems to be limited, so far at least as it is a special privilege, to the time of freshets. See *Caldwell v. McLaren*, 9 App. Cas. 392, 410.

The river is said to be navigable, although I see nothing on the subject in the evidence. If navigable, it would seem properly

to fall under the jurisdiction of Parliament, which, by sec. 91, clause 10, of the British North America Act, is given exclusive jurisdiction to legislate concerning the subjects of navigation and shipping. The work which the plaintiffs had contracted to perform was duly authorised, and was undertaken for the purpose of improving the navigation of the river. These circumstances would seem to confer upon the plaintiffs the right which they assert to build in the bed of the river, as a necessary part of the work which they had undertaken for the Crown, a coffer-dam, and to maintain it there for a reasonable time in aid of the work which they had undertaken.

These rights, however, are not, I think, mutually exclusive, but were quite capable of being reasonably exercised without any necessary clash.

The defendant's special right exists only, as before pointed out, in time of freshets, a time when it would at least be unusual to attempt to do such work as the plaintiffs', in the bed of the stream, requiring the use of a coffer-dam, work one would expect to be done in the low water of summer after the spring freshets are over and the lumbering operations are at an end for the season.

Nor is it properly a question of conflict between the provisions of the Imperial Act conferring jurisdiction on Parliament in matters respecting navigation, and the provincial statute which gives the right of floatage in all streams of the Province to the lumbermen in time of freshet. The latter right existed long before Confederation. Its history is given in the case before referred to of *Caldwell v. McLaren*. And there has been no legislation by Parliament upon the subject in any way altering or limiting this right. The plaintiffs' position is that merely of a contractor with the Crown. As against the defendant's statutory right, they can only assert the exigency of their contract, an exigency of which they offered no proof—for that the work is unfinished is none.

The coffer-dam was built in the previous autumn, apparently too late to finish in that season; certainly in itself no sufficient reason for claiming a right to occupy and to be protected by the lumberman in occupying the river during the following spring freshets.

For wilful injury the defendant would of course be liable. And it may even be concluded that for negligence in the use of

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the highway he would also be liable. Middleton, J., expressed the opinion, and his judgment proceeds upon the proposition, that the defendant was excused by the terms of the statute, sec. 3, sub-secs. 2, 3, which authorises the removal of obstructions. I, however, with deference, am unconvinced that the defendant is put upon the defensive.

The learned counsel for the plaintiffs at the trial, as appears in the shorthand notes, put his case on the only intelligible ground upon which, in my opinion, it can rest, namely, that of negligence. And the negligence which he then proposed to shew was negligence in the management of the drive. The evidence, however, entirely fails to shew that the defendant in the management of the drive acted negligently, or otherwise than in the usual and customary way.

The injury of which the plaintiffs complain was evidently caused by the consequences of the jam at the railway bridge, which forced back the logs upon the coffer-dam.

No one suggests that the jam, a common occurrence, occurred by reason of any mismanagement on the part of the defendant. The defendant's operations were also interfered with because of it, and he was as much interested as any one in having it broken up and the logs dispersed and sent on their way downstream, and apparently made all reasonable efforts to that end. The utmost that is said is, that, after the jam had formed, more men should have been employed by the defendant to force and keep the logs moving and away from the coffer-dam. And the suggestion is even made that the defendant should have constructed defensive works to protect the coffer-dam from the pressure of the logs.

But I am quite unable to see why the duty of protecting the plaintiffs' dam against the ordinary consequences of floating logs down the stream in the customary way should be imposed upon the defendant, and not, in the circumstances, upon the plaintiffs themselves.

I would dismiss the appeal with costs.

MACLAREN, J.A.:—I agree.

*Appeal allowed; GARROW and
MACLAREN, JJ.A., dissenting.*

[IN CHAMBERS.]

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April 20.

RE TORONTO ROWING CLUB.

Company—Winding-up—Transfer of Company's Land—Misfeasance of Directors—Order for Production of Books and Documents of Transferee-company—Jurisdiction—Winding-up Act, R.S.C. 1906, ch. 144, secs. 108, 117, 119—Rule 350—"Person"—"Action"—Examination of Person—Basis of Subsequent Proceedings.

In the course of a reference for the winding-up of an insolvent company, it appeared that the company's land had been transferred to another company, and a large profit had been made. Misfeasance of the directors was charged, and, at the instance of the liquidator, an order was made for the production and inspection of all books and document in the possession or control of the transferee-company:—

Held, that sec. 108 of the Winding-up Act, R.S.C. 1906, ch. 144, practically incorporated Rule 350 of the Rules of the Supreme Court of Ontario, and that Rule and secs. 117 and 119 of the Act conferred jurisdiction and warranted the making of the order.

Scope and meaning of "person" as used in secs. 117 and 119 (having regard to the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (20)) and of "action" in Rule 350.

A person against whom no proceedings are pending is bound to go before the examiner, though he may conceive that the examination is required for the purpose of afterwards proceeding against him.

Re Contract Corporation, Hakin's Case (1871), 25 L.T.R. 552, followed.

AN appeal by the Security Realty Company from an order of the Master in Chambers requiring that company to make discovery of documents upon a reference for the winding-up of the Toronto Rowing Club, under the Dominion Winding-up Act, R.S.C. 1906, ch. 144.

April 18. The appeal was heard by *Boyd, C.*, in Chambers. *J. F. Boland*, for the appellant company.

Harcourt Ferguson, for the liquidator of the Toronto Rowing Club.

April 20. *Boyd, C.*:—The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action, or proceeding within the jurisdiction of the Court: R.S.C. 1906, ch. 144, sec. 108. Section 117 provides for the examination of any person whom the Court deems capable of giving information concerning the dealings, estate, or effects of the company; and any such person may be required to produce before the Court any paper, book, deed, writing, or other document in his custody or power relating to the company: sec. 119.

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The Master has already made an order to proceed under the misfeasance clause of the statute, as to the directors (past or present) of the company: sec. 123.

Upon the examination of one of the directors it appears that a deal took place by the officers of the insolvent company whereby the real estate of the company was transferred in January, 1914, to another company, formed, as it appears, in order to take over that property, and that such company, the Security Realty Company, sold and made a large profit out of that land in February, 1914. It is in evidence that the same individuals were in whole or in part directors of both companies (the Toronto Rowing Club and the Security Realty Company). This *prima facie* aspect of affairs indicates that an investigation is required in the interests of the creditors of the insolvent company. The Master has issued an order, at the instance of the liquidator, calling for the production and inspection of all books, papers, &c., in the power, possession, custody, or control of the said Security Realty Company.

An appeal is taken by that company, and is put on the ground that the Master had no jurisdiction so to order, which, it is alleged, he did in pursuance of a new Rule of the Supreme Court of Ontario, No. 350. That provides that when a document is in possession of a person not a party to the *action*, and the production of which might be compelled at the trial, the Court may, at the instance of any party, direct the production and inspection thereof.

The pith of the objection is, that this winding-up proceeding is not an "action." No decision has yet been given on the effect and scope of the Rule.

I think, to advance the interests of justice and to simplify procedure, it would not be an unnatural construction to hold that the Act, sec. 108 (cited already), practically incorporates this Rule within its purview.

The matter is carried even further and directly by secs. 117 and 119 of the Act, by which any person deemed capable of giving information may be required to attend and be examined and make production of pertinent documents. "*Person*," by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (No. 20), includes any body corporate and politic unless the context otherwise

requires. I do not read this context as narrowing the meaning of "person" in its full statutory compass.

The cases cited by Mr. Boland were all in relation to getting inspection of bankers' books by an outsider. And the cases shew that the order may be made when the discovery appears to be material to the case of the applicant, and the application is made *bonâ fide*. These requisites appear on the present application.

It has been decided that a person against whom no proceedings are pending is bound to go before the examiner, though he may conceive that the examination is required for the purpose of afterwards proceeding against him: *Re Contract Corporation, Hakin's Case* (1871), 25 L.T.R. 552.

There was jurisdiction to make the order, and the appeal should be dismissed with costs.

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[IN CHAMBERS.]

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April 22.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Appeal—Privy Council—Judgment of Appellate Court Affirming Dismissal of Action—Order for Payment of Money out of Court—Security as upon one Appeal.

Where an order is made consequent upon the judgment disposing of the action, and it is so connected with the judgment as properly to form the subject of one and the same appeal, and its inclusion will lead to no additional inquiry or expense, an appeal from it may be entertained so that both it and the judgment may be dealt with together. In that case the security to be given on the appeal should be such as is appropriate to one appeal.

Concha v. Concha, [1892] A.C. 670, followed.

MOTION by the plaintiffs to allow the security on a proposed appeal to His Majesty in His Privy Council from the judgment of a Divisional Court of the Appellate Division, *ante* 485, dismissing the plaintiffs' appeal from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624, dismissing the action.

April 17. The motion was heard by HODGINS, J.A., in Chambers.

A. C. McMaster and J. H. Fraser, for the plaintiffs.

W. N. Tilley, K.C., for the defendants the Ottawa Separate Schools Commission.

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A. R. Clute, for the defendants the Corporation of the City of Ottawa.

J. A. McEvoy, for the Attorney-General for Ontario.

April 22. HODGINS, J.A.:—Motion by the plaintiffs to allow the security on an appeal to the Privy Council from the judgment of the First Divisional Court dismissing the action. The amount paid in is \$1,000. Objection is taken that there is no appeal from the order, made when the appeal was dismissed, that the money in Court be paid out to the defendants the Ottawa Separate Schools Commission. It is also said that, if an appeal from that order is competent, it is a separate one, and that an additional \$1,000 should be paid into Court.

The action was, in form, for an injunction restraining the defendants the Corporation of the City of Ottawa from paying the moneys raised by the taxation of Separate School supporters to the Separate Schools Commission. The action was dismissed after the hearing, and that dismissal was affirmed by the First Divisional Court. In the meantime, money from these taxes reached the hands of the defendants the Corporation of the City of Ottawa, and a motion was made, during the pendency of the appeal, for its payment into Court.

An order to that effect was made on the 10th February, 1916, and was complied with. On the day on which the appeal was dismissed, the money was ordered out of Court to the Separate Schools Commission, who have since received it. The order was a direct consequence of the result of the appeal, as the question which really lay at the foundation of the action was the right of that Commission to act in place of the plaintiffs, who, as is recited in the legislation in question, were refusing to carry out their lawful duties.

The taking out of an order, separate and distinct from the decree of the Court, was, I presume, in accordance with proper practice, but it was unnecessary. The direction might have been included in the judgment dismissing the action.

If that judgment is wrong, then the order must be subject to revision; and, if the judgment is right, then the order cannot be wrong. The one is the natural result, both in a practical way and in a legal sense, of the other. An appeal against the judgment

only, if it succeeds, would be followed by a direction for the return of the money or an account, if it in fact had been applied to the objects for which the plaintiffs would have been bound to expend it. An appeal against the order only would seem to invite dismissal if the main judgment was not contested.

But I think the proper ground upon which to rest my conclusion is, that it is really part of the judgment of the Court, or if, in a technical sense, it is a separate order, that it comes within the rule referred to by Lord Macnaghten in *Concha v. Concha*, [1892] A.C. 670, namely, that where an order is so connected with the judgment as properly to form the subject of one and the same appeal, and its inclusion will lead to no additional inquiry or expense, an appeal from it may be entertained so that both may be dealt with together.

An order may go approving of the security on one appeal, which will include both the judgment and the order.

The costs will, in so far as I have any jurisdiction, be costs in the appeal.

[IN CHAMBERS.]

REX V. DARROCH.

Criminal Law—Keeping "House of Ill-fame"—Magistrate's Conviction—Jurisdiction—Criminal Code, R.S.C. 1906, ch. 146, sec. 774—Amendment by 8 & 9 Edw. VII. ch. 9—"Disorderly House"—Power to Amend Conviction—Criminal Code, secs. 791, 852, 1124.

Section 774 of the Criminal Code, R.S.C. 1906, ch. 146, gave absolute jurisdiction to a magistrate in case of a person charged with keeping a disorderly house, house of ill-fame, or bawdy-house. By a statute of 1909, 8 & 9 Edw. VII. ch. 9, sec. 774 was amended, and the jurisdiction was declared to be as to one charged with keeping a disorderly house or being an inmate of a common bawdy-house—"house of ill-fame" being dropped. A magistrate's conviction in 1916, ignoring the change in the statute, was for that the defendant "did keep a certain house of ill-fame." The evidence amply supported the charge that the place in question was kept and used by the defendant for purposes of prostitution:—

Held, that the conviction was in substance good, and the form should be amended by describing the offence as "keeping a disorderly house, to wit, a house of ill-fame:" secs. 791, 852, and 1124 of the Code.

The promiscuous use in Canadian statutes of the various synonymous terms descriptive of a house of prostitution, exemplified.

Rex v. Hayes (1903), 5 O.L.R. 198, 6 Can. Crim. Cas. 357, distinguished.

MOTION on behalf of the defendant to quash a conviction made by Rupert E. Kingsford, Esquire, Police Magistrate in and for the City of Toronto.

Hodgins, J.A.

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The conviction was for that the defendant, "within six months ending on the 30th day of March, A.D. 1916, in the said city of Toronto, unlawfully did keep a certain house of ill-fame situate and known as number 336 Adelaide street west, in the said city of Toronto, contrary to the form of the statute in such case made and provided."

April 18. The motion was heard by *Boyd, C.*, in Chambers.
A. G. Ross, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

April 25. *Boyd, C.*:—The English language is, unfortunately, well supplied with synonymous terms descriptive of a house of prostitution—e.g., disorderly house, house of ill-fame, brothel, bawdy-house—and these have been rather promiscuously used in Canadian statutes. For instance, in C.S.C. ch. 105, sec. 1, sub-sec. 7 (1859), the collocation is "disorderly house, house of ill-fame or bawdy-house." In R.S.C. 1886, ch. 157, sec. 8 (*j*), it is enlarged to "disorderly houses, bawdy-houses, or houses of ill-fame, or houses for the resort of prostitutes." In R.S.O. 1897, in the Municipal Act, ch. 223, it is shortened to "disorderly houses and houses of ill-fame:" sec. 549 (3). The course of more modern criminal legislation may be noted. The Criminal Code, sec. 774, gives absolute jurisdiction to magistrates in case of a person charged with keeping a disorderly house, house of ill-fame, or bawdy-house. To this number, the marginal annotation is, "Absolute jurisdiction in respect to houses of ill-fame." This section 774 was changed by the statute of 1909, 8 & 9 Edw. VII. ch. 9, and the jurisdiction was as to one charged with keeping a disorderly house or being an inmate of a common bawdy-house. "House of ill-fame" is dropped as being surplusage, but the old word still clings to the marginal note, which is, "Absolute jurisdiction in respect to houses of ill-fame." This note is, of course, not of authority, but it serves to indicate which is the fact, that "house of ill-fame" is the same as "bawdy-house" and is included in "disorderly-house"—a term to which the Legislature have attached a more comprehensive meaning, and have in effect eliminated the term "house of ill-fame" in reference to "vag-rancy." This is carried out by repealing paragraphs (*j*) and

(k) of sec. 238 of the Criminal Code by 5 Geo. V. ch. 12, sec. 7 (1915); and, by sec. 8 (bringing into it intermediate amendments), it provides that the magistrate can hear and determine as to any one charged with keeping a disorderly house under sec. 228 of the Code. That section enables him to deal with one who "keeps any disorderly house, that is to say, any common bawdy-house."

By sec. 225 of the Code, a common bawdy-house is "a house . . . or place of any kind kept for purposes of prostitution." Now that is precisely the meaning of the term used in the information and conviction in this case. And the evidence amply supports the charge that the place in question was kept and used by the defendant for purposes of prostitution. I cannot see why this should not be read as a good conviction in respect of an offence committed, no matter by what one of many synonyms it may be designated. The defendant was well aware of what was charged; she appeared and made defence and offered evidence. If any superficial error be attributed in the way the charge was formulated, that is venial and susceptible of amendment according to the facts proved. The Code recognises that popular language may be used in indictments, and good sense would extend the same to summary proceedings: Criminal Code, sec. 852.

It was urged that an amendment was not permissible, and *Rex v. Hayes* (1903), 6 Can. Crim. Cas. 357, 5 O.L.R. 198, was cited; but there the charge involved matters of substance and not of form. The ample power of amendment as to indictments does not in terms apply to summary proceedings; had this offence as stated been prosecuted by indictment, I cannot doubt that its form of expressing the offence would have been amendable, and sec. 791 of the Code would seem to assimilate the proceedings to those on an indictment. Again, sec. 1124 of the Criminal Code, not cited before me, appears to apply exactly to a proper amendment here by describing the offence as "keeping a disorderly house, to wit, a house of ill-fame."

The phrase "keeper of a house of ill-fame" does not now designate the offence in the terms of the Criminal Code, but it still designates an indictable offence at common law and a criminal offence according to the ordinary language of the people. The statutory change is one of form and not of substance, and now-a-

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days, even in criminal law, the Court will see to it that form does not predominate over substance. See *Regina v. McNamara* (1891), 20 O.R. 489.

It was said in argument that a decision of my brother Middleton, on the 11th April, in *Rex v. McKenzie*, unreported, is against my conclusion. I have conferred with that learned Judge, and I find that he entirely concurs with the present judgment (see sec. 32 of the Judicature Act).

And the judgment is that the conviction should be amended as indicated and affirmed with costs.

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[IN CHAMBERS.]

April 25.

RE D'ANDREA.

Infant—Custody—Neglected Child—Children's Aid Society—Order of Commissioner of Juvenile Court—Foster-home Found by Society—Application of Father for Return of Child—Discretion of Court—Welfare of Infant—Evidence—Onus—Apprentices and Minors Act, R.S.O. 1914, ch. 147, secs. 3 (1), 4—Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, secs. 14, 27—Views of Infant as to Custody—Costs.

A female child, born in 1907, was, in 1913, her father having deserted his family and her mother being an inmate of a reformatory, taken by the Children's Aid Society of Toronto, upon an order made by the Commissioner of the Juvenile Court, pursuant to the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, and placed in a foster-home, where she was well cared for. In June, 1914, the parents came together again; and in March, 1915, proceedings were commenced by the father against the society and the foster-parents, upon *habeas corpus*, to compel the return of the child:—

Held, that the parents by their conduct had opened the door for the benevolent work of the society, acting *in loco parentis* to the deserted child; and, the society's intervention having reached its culmination in finding a new and suitable home for the waif so rescued, the Court ought not lightly to interfere with the *status quo*.

Sections 14 and 27 of the Children's Protection Act and secs. 3 (1) and 4 of the Apprentices and Minors Act, R.S.O. 1914, ch. 147, considered.

In re McGrath, [1893] 1 Ch. 143, 148, and *In re Goldsworthy* (1876), 2 Q.B.D. 75, 84, specially referred to.

The child being not yet 9 years old, it was not necessary to ascertain her views: R.S.O. 1914, ch. 147, sec. 3 (1).

In re Agar-Ellis (1883), 24 Ch.D. 317, 326, specially referred to.

The onus was upon the father to shew that the removal of the child from the custody of the foster-parents would enure to her welfare, and that onus had not been discharged.

The father's application was refused *without costs*: the parent should not be penalised in any *bonâ fide* attempt, though ill-advised, to get back his child.

APPLICATION by the father of the infant Lilli D'Andrea, upon the return of a writ of *habeas corpus*, for an order for the delivery

of the infant into his custody by the Children's Aid Society of Toronto and foster-parents with whom the society had placed the child.

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April 20. The application was heard by BORD, C., in Chambers.

Frank Denton, K.C., for the applicant.

W. B. Raymond, for the society and the foster-parents.

April 25. BORD, C.:—This is an application by the father for the delivery to him of his infant daughter Lilli D'Andrea, now in the home of foster-parents appointed by the Children's Aid Society of Toronto. The daughter was born on the 6th September, 1907, and is now about 8½ years of age. Her birth was three months after the father had deserted her mother and family in Boston, U.S.A. The father says that the separation was due to "general infelicity" and not to any immoral or improper conduct on the part of either. In June, 1914, they came together again, and since then they have lived together in a commendable manner, according to the affidavits of various persons.

In June, 1913, while yet the father was absent and the mother was undergoing a three months' imprisonment in the Mercer Reformatory "for shooting," she authorised Michael Basso to look after the child, and he suggested, with her assent, the Children's Aid Society. The mother says this was merely a temporary provision, as she expected that on her release the child would be returned. This is contradicted by Mr. Basso, who says he explained to her that the society would do what they thought was best and proper with the child.

On the 11th June, 1913, Basso brought the case formally before Mr. Commissioner Starr in the Juvenile Court, and testified that the mother left her husband in Boston, and had since been living in immoral relation with another man, and that the child had been brought up in these surroundings; that the mother was then serving a term of three months in the Mercer Reformatory—had served time before—and that she "shot the man she was living with some time ago."

On the same day the Commissioner noted his decision thus: "On evidence child found to be neglected and order made committing child to Toronto C.A. Society."

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The order for delivery of the child to the society declares that "I do find that the said Lilli is a dependent and neglected child within the meaning of the Act for the Protection and Reformation of Neglected Children so as to be growing up without salutary parental control and education and in circumstances exposing such child to an idle and dissolute life." It is ordered that the "child be delivered into the custody of the Children's Aid Society and that now she be taken to the temporary home or shelter to be kept until placed in an approved foster-home."

Pursuant to the provisions of the statute in that behalf, the society proceeded to place the child out in a suitable home with foster-parents, and by proper documents completed all arrangements to that result on the 19th November, 1913.

The indenture executed by the society and the foster-parents constituted them the legal guardians of the minor, and they agreed to support, educate, and assume the duties of parents towards the child. Strict and explicit directions are therein given and undertaken by the foster-parents as to the physical, moral, and religious up-bringing of their ward.

There is evidence in the affidavit of the Revd. W. Ryan, local agent of the society in the district of Nipissing (in some part of which the child is living), that the obligations of the foster-parents have been properly observed, and that the child is much better than when she first came there, and that in February, 1914, she was in excellent health. It is now proposed, after 2½ years, to disturb this relationship and to have the child restored to the applicant, her father.

The father returned to his home in June, 1914; and on the 25th November of that year the first application was made to the society for a return of the child. The president of the society, after some investigation, satisfied himself that the child should not be interfered with. Then in March, 1915, legal proceedings began. These were somewhat delayed because the officers of the society examined refused to disclose the names and place of residence of the foster-parents. An order was made by Mr. Justice Britton on the 1st April, 1915, that the questions should be answered by the society. Mr. Justice Britton's order, upon appeal by the society to the Second Divisional Court of the

Appellate Division, was discharged. There is no published note of the grounds of this decision; but, on inquiry of Mr. Justice Riddell, I learn that the Court, in the circumstances of the case as disclosed, did not think it proper to order discovery to be made, and so in effect decided that there was a qualified privilege exercisable by the society in suitable cases, with which the Court will not interfere. There is, therefore, no absolute right in the parent or applicant to compel a disclosure of the whereabouts of the foster-home and the names of the foster-parents, but the right is subject to the sound and reasonable discretion of the society, controlled of course by the Court, as to when the applicant is to be assisted in this direction. Here the society undertake to appear for the foster-parents; and so the matter, after some delay, was brought on for final disposition, with the addition of further and fresher affidavits, in the early part of this year.

The affidavits for the applicant go to shew that since his return he has for less than a year and a half lived with his wife and family in domestic order and comparative comfort; that he has gathered a little money together, and is a good worker, as is also his wife, and that they are able and willing to provide for this youngest child, and seek her return.

Having laid this foundation of restored domestic relations suitable for the return of the girl, coupled with the ability and the willingness of the parents, the stress of the argument is, that the natural right of the father as a parent to the custody of his child is paramount, or should at least be preferred to the claim of the society and the foster-parents. The normal well-ordered home is unquestionably preferable to the foster-home, however well-ordered.

Had the applicant always lived in his home as now, no removal of a child could have taken place. But both the parents by their conduct opened the door for the benevolent work of the Children's Aid Society to act *in loco parentis* to the deserted child. Their intervention has duly reached its culmination in finding a new and suitable home for the waif so rescued. And the Court ought not, on general principles, lightly to interfere with the *status quo*.

This brings me to the next question, whether, the removal having rightly taken place, and the child having been legally

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taken over by the statutory guardian and legally transferred to foster-parents, who stand, by the act of the law, *in loco parentis*, she should be taken away from an unexceptionable home, in a healthy locality, and transferred to the crowded life of a city, with no reasonable assurance that the well-being of the child will be in any wise bettered by such a change. The antecedents of both parents are not reassuring—though both may have turned over a new leaf and made a better beginning in life. Still the Court, having regard to the claims of the child, should not act on a peradventure, and perhaps undo many good and wholesome qualities cultivated by the foster-parents. This is the *crux* of the controversy. Is it not the better policy, contemplated by the Legislature, to leave well alone? There is no evidence that the foster-parents have for these two years and a half failed in their duty; the contrary is the present aspect of the situation. There is no assurance that the contemplated change will work for the benefit of the child—will make for the improvement of her physical, moral, and religious condition.

This whole situation being the outcome of paternal legislation, and the functions and attitude of the Judge being also of paternal character, according to the venerable jurisdiction of the Court of Chancery, it is fitting to consider the statutes which control and the state of the law as interpreted by its masters and exponents.

The position of the society to which a child is committed, and that of the foster-parents to whom the child is transferred by the society, are legally defined. The society becomes the legal guardian of the child: Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, sec. 14 (1); and the foster-parent, who agrees to assume the duty of a parent and to whom the society hands over the person of the child, is also constituted legal guardian of the child: Apprentices and Minors Act, R.S.O. 1914, ch. 147, sec. 3 (1).

From the custody of such foster-parents and from the protection of such foster-home the child shall not be removed by the parent unless it be made clear to the Judge and he is satisfied that the removal will tend to the advantage and benefit of the minor: R.S.O. ch. 147, sec. 4; R.S.O. ch. 231, sec. 14 and sec. 27. That legislation is the embodiment of a principle well recognised

and followed in the exercise of the Court's paternal jurisdiction in regard to infants. As expressed by Lindley, L.J., in *In re McGrath*, [1893] 1 Ch. 143, 148, the duty of the Court is "to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken;" and he goes on to explain that the word "welfare" is read in its widest sense—that "the moral and religious welfare of the child must be considered as well as its physical well-being."

As to the affidavits filed by the applicant touching his present domestic conditions, we must, as said by Pollock, B., in *In re Goldsworthy* (1876), 2 Q.B.D. 75, 84, apply to this phase "our general experience of life, and (to) remember . . . how easy it is for a man to find persons ready to speak in his favour, when they can know nothing of his inner life." This home is that of a foreigner, and those who speak of its commendable character can be only superficially informed. But, granting full measure of acceptance to what is said, we have on the other side no suggestion by the applicant that the foster-home is other than it ought to be. True it may be that the applicant, not knowing the names and residence of the foster-parents, cannot supply any evidence on that head; yet we have the assurance by the direct evidence of the local agent of the Children's Aid Society that all the obligations of the foster-parents have been observed, and we have the moral effect of the supervision of the society itself to see that the child is well cared for. The situation, as contemplated by the Legislature and interpreted by the Courts, is, that there is a certain measure of privilege extended to these foster-parents, that they shall not be disturbed by the interference of parents who have been judicially determined to be unfit custodians of their children, and that the even tenour of the child's life in the new home should not be interrupted by outside undesirable influences. This being the situation, it is to be assumed that the present custody of the child is salutary and in every way convenient and proper in itself, and the onus is on the applicant to shew that a change is desirable in the interests of the child.

Our law is to some extent based on the English Custody of Children Act of 1891 (54 Vict. ch. 3); and before that Act the law was laid down in England that it was necessary for one who,

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by reason of his parental right, sought to take his child out of custody otherwise unobjectionable, to satisfy the Court that the child might be removed and restored to him without imperilling the safety or welfare of the child in some serious and important respect: *In re Goldsworthy*, 2 Q.B.D. 75.

It occurred to me during the argument that it might be well to speak with the child. "Up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. . . . The law has now fixed upon certain years—as to boys the age of 14, and as to girls the age of 16—up to which, as a general rule, the Court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of 14 in the case of a boy, and above the age of 16 in the case of a girl, the Court will inquire whether the child consents to be where it is." Brett, M.R., in *In re Agar-Ellis* (1883), 24 Ch. D. 317, 326. That is "the age of discretion." Eversley on Domestic Relations, 3rd ed., p. 510. This question of age is discussed in *In re Connor* (1863), 16 Ir. C.L.R. 112, 118; and there is an interesting case of *In re O'Hara*, [1900] 2 I.R. 232, in which a girl of 11 was examined by the Judge below, but in appeal the case was decided on parental rights, as the case did not fall within the Custody of Children Act. In Ontario, the sense of the community has changed these figures so that the age of discretion, as of consent, stands at 14 for a boy and 12 for a girl: R.S.O. 1914, ch. 147, sec. 3 (1); and see *Smart v. Smart*, [1892] A.C. 425, at p. 435.

In the light of what has been said as to age, the last clause of sec. 27 of the Children's Protection Act may be explained. It reads: "Nothing in this section shall affect the power of the Judge to consult the wishes of the child in determining what order ought to be made or any right which a child now possesses to exercise its own free choice." R.S.O. 1914, ch. 231, sec. 27, sub-sec. 5.

In the first part of the sub-clause, "the power of the Judge" refers, I take it, to the discretionary power exercised by a Judge in Equity to inform himself as to the child's mind and wishes, even if of comparatively tender years; the last part, "the right of the child," refers to the power of vetoing or consenting given

by the Apprentices and Minors Act to boys of the age of 14 and girls of the age of 12: R.S.O. ch. 147, sec. 3 (1).

The age of the girl in this case, not yet 9 years old, is not such as to require me to ascertain her views, which, whatever they are, could, I think, throw little, if any, light on the matter to be decided.

The applicant has to prove or to shew in some satisfactory way that the removal of the child from the custody of the foster-parents will enure to the welfare of the child. The onus on the parents has not been discharged. In my best judgment, after much consideration of all the aspects presented, it does not seem to me, in the interest of the minor, that any change is desirable.

The application is refused, but it is not a case for costs, even if any be asked. The parent should not be penalised in any *bonâ fide* attempt, though it may appear ill-advised, to get back his child.

[SUTHERLAND, J.]

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Land Titles Act—Assignment of Charge—"Subject to the State of Account"—R.S.O. 1914, ch. 126, sec. 54 (4)—Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, secs. 2, 7—Charge Executed in Blank—Moneys Advanced by Assignee Misappropriated by Husband of Chargee—Right of Assignee to Enforce Charge—Fraud—Mortgage—Foreclosure.

Section 54 of the Land Titles Act, R.S.O. 1914, ch. 126, must be read in conjunction with secs. 2 and 7 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109.

By sub-sec. 4 of sec. 54, every transfer of a charge shall be subject to the state of account upon the charge between the chargor and the chargee:—*Held*, in the circumstances of this case, no notice having been brought home to the plaintiff, the registered assignee of a charge by way of mortgage, that the consideration acknowledged by the chargor had not in fact been paid by the chargee, that the plaintiff was not thereby affected—it is only in so far as the chargor has made payments to the chargee subsequent to the date of the charge that the assignee can be affected by the "state of account."

Held, also, that the plaintiff had a right to treat her assignor as the holder of a valid charge, although in fact the latter had paid nothing to the chargor; he, by signing a charge in blank and delivering it to C., put it in C.'s power to insert his wife's name as chargee and assign the charge to the plaintiff; and the chargor, rather than the plaintiff, must suffer for the indiscretion which led to the commission of a fraud by C., who obtained from the plaintiff and misappropriated the money she had agreed to advance upon the assignment of the charge.

The plaintiff was, therefore, *held*, entitled to enforce her charge by foreclosure.

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AN action by a second mortgagee to enforce by foreclosure a mortgage or charge made by the defendant upon land which had been brought under the Land Titles Act.

The action was tried by SUTHERLAND, J., without a jury, at Toronto.

J. E. Jones and V. H. Hattin, for the plaintiff.

S. H. Bradford, K.C., for the defendant.

April 27. SUTHERLAND, J.:—On the 10th December, 1915, the defendant Andrew M. Harper was the owner of parts of lots 1 and 2 on the west side of Major street, plan "M" 21, filed in the office of Land Titles at Toronto, subject to a mortgage for \$3,100. Requiring more money, he applied to the International Capitalists Limited, of which one Ernest Constant was manager and probably proprietor, to obtain a further loan on second mortgage of \$800.

After some negotiations it was apparently agreed between them that if the loan were obtained the defendant Harper would pay a commission of \$200, and the mortgage might be made for \$1,000 to enable him to carry out this arrangement.

It appears that the defendant Harper was then owing to the Imperial Life Assurance Company, in connection with the first mortgage, the sum of \$530. A written but unsealed charge or mortgage under the Land Titles Act for \$1,000, with interest at $6\frac{1}{2}$ per cent. per annum, dated the 10th December, 1914, covering the said lands, was prepared by Constant, the name of the proposed chargee being left blank, and while in that form was signed by the defendant A. M. Harper, his wife, Mabel Harper, joining to bar dower.

Two papers, one an undated letter of instructions, on letter-paper headed "International Capitalists Limited," and reading as follows, "I hereby instruct you to deduct a sum not exceeding the amount of \$530 from my loan and hand same to the Imperial Life Assurance Company, on payment on interest on mortgage," and the other an application for a loan of \$800, dated curiously the 16th December, 1914, were also signed by Harper and apparently given to Constant. The application for a loan has also the printed name of the company at the top, but contains no authority to receive or disburse the moneys.

Some time after the execution of the charge by Harper, Constant filled in the name of his wife, Gladys Constant, as chargee. He applied to the plaintiff, Eliza Dodds, for a loan on the lands in question, and arranged with her that if she would advance \$850 he would procure a mortgage for which she would receive \$1,000. She went and saw the property and the defendant Harper, and, having made up her mind that the security was good enough for an advance on second mortgage of \$850, notified Constant to that effect, and put the matter in the hands of her solicitors, furnishing them with the funds to carry out the transaction. They prepared an assignment of the charge from Gladys Constant to the plaintiff, dated the 19th December, 1914. This was executed by Mrs. Constant, her husband, Ernest Constant, being the witness to her signature and making the affidavit of execution.

On the 23rd December, 1914, the plaintiff's solicitors issued their cheque for \$835 (the difference being for costs) in favour of Gladys Constant, who endorsed it. It was subsequently apparently endorsed by the International Capitalists Limited, per E. Constant, and cashed. The charge and assignment were registered on the 23rd December, 1914, in the Land Titles office at Toronto.

Harper applied several times to Constant at the International Capitalists Limited to know if the money had been obtained, and was apparently put off by him. In the end, Constant suddenly left Toronto, and an order was subsequently made for the winding-up of the company. No money was paid to the Imperial Life Assurance Company or to the defendant Harper, and apparently Constant appropriated the \$835.

Under these circumstances, the plaintiff, on the 18th day of June, 1915, issued her writ herein, claiming \$1,000 principal money and interest as therein provided under the terms of the said charge or mortgage and the assignment thereof. The defendant Harper entered an appearance to the writ and filed an affidavit in which he states that he is advised and believes that the mortgage is not a good and valid security for any amount whatever and is not a security for any moneys actually advanced thereunder.

The main defences set up are two: first, that the plaintiff be-

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came assignee of the charge subject to the existing state of the account between chargor and chargee; and, second, that the onus is upon the plaintiff to shew that Constant or the company was clothed with authority to receive the money from the plaintiff, and the plaintiff has failed to shew it.

By the Land Titles Act, R.S.O. 1914, ch. 126, sec. 30, it is provided:—

“(1) Every registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest, or as security for any other purpose, and with or without a power of sale.

“(2) The charge shall be completed by the proper Master of Titles entering on the register the person in whose favour the charge is made as the owner of the charge, stating the amount of the principal sum which the charge secures, with the rate of interest and the periods of payment, or the other purpose for which the charge is given.”

By sec. 54: “(1) The registered owner of a charge may, in the prescribed manner, transfer such charge to another person as owner.

“(4) Every transfer of a charge shall be subject to the state of account upon the charge between the chargor and the chargee.”

And by sec. 102: “Notwithstanding the provisions of any statute, or any rule of law, any charge or transfer of land registered under this Act may be duly made by an instrument not under seal, and if so made the instrument and every agreement, stipulation and condition therein shall have the same effect for all purposes as if it were made under seal.”

The charge or mortgage in question herein is similar in form to a mortgage, and is referred to therein as a mortgage, and the terms “mortgagor” and “mortgagee” are applied to the chargor and chargee throughout.

It is important to consider what is the effect of the words “subject to the state of account.” If they mean simply, subject to the actual state of the account as it existed between chargor and chargee, then the plaintiff herein must fail, as no money had been paid by the chargee to the chargor at all. I am of opinion, however, that sec. 54 of the Land Titles Act must be

read in conjunction with secs. 2 and 7 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109. It is provided by sec. 2 of this Act:—

“(a) ‘Conveyance’ shall include assignment, appointment, lease, settlement, and other assurance, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property . . . ”

“(c) ‘Mortgage’ shall include any charge on property for securing money or money’s worth.”

Section 7: “A receipt for consideration money or other consideration in the body of a conveyance or endorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.”

This charge is, I think, to be considered and treated as though it were an instrument under seal, a mortgage; and, no notice having been brought home to the plaintiff that the consideration acknowledged therein by the chargor had not in fact been paid, I am of opinion that the effect of the words “subject to the state of account” in the Land Titles Act, in the circumstances, is, that it is only in so far as the chargor has made payments to the chargee subsequent to the date of the charge that the assignee can be affected by the state of the account. Here no such payments of course were made.

On the question of the authority of Constant or the company to receive the money I was referred to such cases as *Gillen v. Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada* (1884), 7 O.R. 146; *McMullen v. Polley* (1886), 12 O.R. 702; see also (1887) 13 O.R. 299; *In re Tracy, Scully v. Tracy*, (1894), 21 A.R. 454; *Rose v. Sutherland* (1899), 32 N.S.R. 243; *Gervais v. McCarthy* (1904), 35 S.C.R. 14; *Foreman v. Seeley* (1902), 2 N.B. Eq. 341. But this is rather a case in which the chargor, by his own indiscretion in signing the charge in blank and delivering it in this condition to Constant, put it in his power to insert his wife’s name as the chargee therein and deceive the plaintiff.

It seems to me that, in the circumstances, the plaintiff had a right to treat Mrs. Constant as a valid holder of the charge and

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to issue a cheque for the money in her favour, as was done. I think it was the lack of caution or ignorance on the part of the defendant that led to the commission of the fraud, and that he must suffer rather than the plaintiff. Reference to Coote's Law of Mortgages, 8th ed., vol. 2, pp. 1320, 1321; *Farquharson Brothers & Co. v. King & Co.*, [1902] A.C. 325; *Hiorns v. Holtom* (1852), 16 Beav. 259; *Hunter v. Walters* (1871), L.R. 7 Ch. 75, 79; *King v. Smith*, [1900] 2 Ch. 425; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Bickerton v. Walker* (1885), 31 Ch. D. 151; *Jones v. McGrath* (1888), 16 O.R. 617; *Manley v. London Loan Co.* (1896), 23 A.R. 139; *Bateman v. Hunt*, [1904] 2 K.B. 530.

The plaintiff will therefore have judgment for foreclosure as claimed. Her counsel having intimated during the argument that, in the circumstances, she would be content to accept for principal money the amount actually advanced, viz., \$850, the judgment on the covenant will be limited to that sum, with appropriate interest under the terms of the mortgage, and costs of action.

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[BOYD, C.]

April 27.

RE CUTTER.

Will—Construction—Real and Personal Estate Given to Executors upon Trust—Residuary Gift in Favour of Sister—Gift over of “Unused or Unexpended Balance”—Absolute Interest Cut down to Life Interest—Condition in Restraint of Marriage—Invalidity—Mixed Fund—“Revert”—Encroachment upon Capital for Maintenance of Sister—Enjoyment of Money and other Things in Specie—Insurance Moneys.

The testator by his will gave all his estate, which consisted of both realty and personalty and was valued at about \$19,000, to his executors in trust (first) to pay debts and two pecuniary legacies and to hand over certain specific chattels to named persons. Then followed this clause: “To my sister,” naming her, “I leave all the residue of my estate. On the decease of my sister . . . the unused or unexpended balance shall revert to the Odd Fellows Home. . . . In the event of the marriage of my sister . . . all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home. . . .” In an earlier clause, the testator desired that his sister should repay to an Odd Fellows Lodge of which he was a member “all sick benefits said Lodge has paid to me, in case my sister feels able so to do.”—

Held, that the weight of authority and the manifest intention of the testator to benefit the Odd Fellows, as well as his sister, led to the conclusion that the apparently absolute gift to the sister should be cut down to a life estate. Review of the authorities.

Constable v. Bull (1849), 3 DeG. & S. 411, and *Philson v. Stevenson* (1903), 37 Ir. L.T.R. 104, 225, specially referred to.

Held, also, that the condition as to marriage, being in general restraint of marriage, was void; and the rule applies to mixed funds and to real and personal estate given together.

Lloyd v. Lloyd (1852), 2 Sim. N.S. 255, 263, *Bellairs v. Bellairs* (1874), L.R. 18 Eq. 510, 516, and *Duddy v. Gresham* (1878), 2 L.R. Ir. 442, 465, followed.

The different operation of rules of construction and rules of law pointed out. "Revert" is a flexible term, and in this will might be read as meaning "turn back."

Held, also, upon consideration of the words "the unused or unexpended balance," that the capital might and should be encroached upon for the purpose of the sister's proper maintenance—she not being resident in Ontario, where were the testator's domicile and estate—but for no other purpose.

Re Johnson (1912), 27 O.L.R. 472, and *In re Thomson's Estate* (1880), 14 Ch.D. 263, followed.

The sister was entitled in specie to the money and other articles *que ipso usu consumuntur* forming part of the estate.

In re Tuck (1905), 10 O.L.R. 309, followed.

The proceeds of a life insurance policy should be treated as money.

MOTION by the executors and trustees appointed by the will of George W. Cutter, deceased, for an order declaring the true construction of the will in regard to certain questions arising upon the gifts, devises, and bequests therein.

The testator died on the 3rd October, 1915, at the city of Mishawaka, in the State of Indiana, having a fixed place of abode in Ontario.

The will was as follows:—

"This is the last will and testament of me, Col. George W. Cutter, presently residing at Mishawaka, county of St. Joseph, State of Indiana. I, hereby revoking all former wills at any time made by me, and being desirous of settling my affairs, in the event of my decease, and having full confidence in the persons after-named as trustees and executors, do hereby give, grant, assign, dispose, convey and make over to and in favour of John Donogh, John T. Hornibrook, Joseph Oliver, and William Brooks, all of the city of Toronto, Ontario, and the survivor of them, as trustees and in trust for the purposes aftermentioned, the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole writs and vouchers thereof; and I nominate and appoint the said John Donogh, John T. Hornibrook, Joseph Oliver, and William Brooks, all of the city of Toronto, Ontario, and the survivor of them, to be my sole executors and trustees of this my will, but declaring that these presents are granted in trust always for the purpose aftermentioned, viz.: (First) I direct my executors and trustees to first

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pay my just debts, funeral and testamentary expenses. (Second) I give devise and bequeath unto my dear friend Charles F. Foster (of the Bank of Montreal), Toronto, Ontario, one thousand dollars and to his wife Mrs. Foster my wife's watch, chain, locket and wedding-ring in the event of my sister dying previously. To Max Thompson (barber) for his kindness to myself & wife three hundred dollars. All my Odd Fellows jewels to Covenant Lodge No. 52 of Toronto, Ontario. I desire that my name Col. George W. Cutter be inscribed on my tombstone. I desire John Edward Cook (barrister) to have my Masonic jewels, Knight Templar cloak and charm and two cushions after my sister's death. I desire William Brooks to have my big diamond ring and his wife my wife's diamond ring after my sister's death. I desire that my gold watch and chain be given to the oldest son of William Brooks in case he joins Covenant Lodge No. 52 I.O.O.F. I desire that my sister Rose repay to Covenant Lodge No. 52 I.O.O.F. of Toronto, Ontario, all sick benefits said Lodge has paid to me, in case my sister feels able so to do.

"To my sister Rose A. Cutter I leave all the residue of my estate. On the decease of my sister Rose A. Cutter the unused or unexpended balance shall revert to the Odd Fellows Home of Toronto, Ontario. In the event of the marriage of my sister Rose, all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home of Toronto, Ontario.

"And I reserve my life rent, and full power to alter, innovate, or revoke these presents in whole or in part. And I dispense with the delivery hereof. And I consent to the registration hereof for preservation."

The following questions were submitted by the applicants:—

(1) The testator in his will states: "To my sister Rose A. Cutter I leave all the residue of my estate. On the decease of my sister Rose A. Cutter the unused or unexpended balance shall revert to the Odd Fellows Home of Toronto." Having regard to what follows the above quotation, should or should not the word "revert" be taken as used by the testator not in its literal sense, but introduced by mistake or ignorance as to the meaning of the same, and, in place of the word "revert," words such as "shall go to" or "I devise and bequeath to" the Odd Fellows Home of Toronto, Ontario, be substituted therefor?

(2) Having regard to the last mentioned quotation from the will, which states that "the unused or unexpended balance shall *revert* to the Odd Fellows Home of Toronto," if it be held that the word "*revert*" should be rejected and other words substituted shewing a devise and bequest to the Odd Fellows Home, has the said Rose A. Cutter any power to mortgage, sell, or convey the real estate left by the testator, free from the control of the executors and trustees, or of the residuary devisee and legatee, the Odd Fellows Home of Toronto?

(3) Following the last mentioned devise and bequest, the will reads: "In the event of the marriage of my sister Rose, all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home of Toronto, Ontario." As this is a mixed fund—(1) Are the executors and trustees bound to transfer to the said Rose A. Cutter, absolutely, all the residue and remainder of the personal property of the testator, forthwith after the payment of all just debts, funeral and testamentary expenses of the deceased, and expenses of the administration of the estate of the testator that may come to their hands? Or (2) must they hold the real and personal property in their possession until the death or marriage of the said Rose A. Cutter, whichever may first happen, for the purpose of distribution of the "unused or unexpended balance" of the estate, and does the word "balance" apply to the real property as well as the personal property left by the deceased?

(4) If the said Rose A. Cutter is entitled to the residue of the personal property, to what extent?

April 20. The motion was heard by *Boyd, C.*, in the Weekly Court at Toronto.

R. G. Smythe, for the applicants.

D. Inglis Grant, for Rose A. Cutter.

O. L. Lewis, K.C., for the Odd Fellows Home.

April 27. *Boyd, C.*:—The testator, Colonel Cutter, had a fixed place of abode in Ontario, at Toronto, where, I suppose, he made the estate which he left in his will, which is all in this Province. He died while on a visit to his sister at Mishawaka, in the State of Indiana, U.S., where she, his chief beneficiary, is resident. The will is dated the 15th April, 1915, and his death was on the

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3rd October, 1915, while he was yet in Indiana. He left no wife or children.

One reading the will as a whole cannot fail to see that he set great store by his connection with the Odd Fellows association, in which he was insured for \$1,000. The whole estate is given to trustees for the different legatees. He gives his Odd Fellows jewels to a Toronto Lodge, and his Masonic jewels, cloak, and charm, to one named; and he desires his sister Rose to repay the Toronto Lodge all sick benefits the Lodge has paid to him, in case she feels able to do so. He is solicitous also for the well-being of his sister, and the clause which occasions the difficulty in this will relates to her in the following terms: "To my sister Rose A. Cutter I leave all the residue of my estate. On the decease of my sister Rose A. Cutter the unused or unexpended balance shall revert to the Odd Fellows Home of Toronto, Ontario. In the event of the marriage of my sister Rose all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home of Toronto, Ontario."

His estate was made up of debentures aggregating about \$4,500; cash in banks and in savings accounts in all about \$10,000; furniture, pictures, and jewellery, estimated at about \$700; the life policy already mentioned of \$1,000; and a parcel of land in Toronto, valued at \$4,000: total, about \$19,000. No estimate is given of debts, etc., to be first paid; but the pecuniary legacies will reduce the money by \$1,300.

Apart from the interpretation of other wills and decisions thereon, the testator's intention appears to be to benefit both his sister and the Odd Fellows Home. He is minded to benefit her so long as she keeps her name and unwedded state; but the husband she chooses (if she does marry) must be one who can keep her, and not one who will depend on her means, derived from the testator.

The last sentence of this clause under consideration throws some light on the first part of it. He says, if the sister marries, "*all the residue hereinbefore bequeathed to her shall go to the Odd Fellows Home.*" This contemplates a substantial residue, diminished, it may be, by her using and spending, but not exhausted. This last part, using the words "*shall go to,*" throws that same meaning to the word earlier used, "revert" to the Odd Fellows

Home. The first part is the difficult one, and I confess that I have not found the solution an easy one, and it may well be that other judicial minds might come to a different conclusion.

My first impression on the argument was, that these first words gave her an absolute estate; but Mr. Lewis's vigorous argument induced consideration. I think that in an earlier state of the law it would have been held that the gift was of the whole residue and that the direction as to the unused and unexpended balance was an expression of intention which would fail of effect on account of its uncertainties: see *per* Sir W. Grant in *Bull v. Kingston* (1816), 1 Mer. 314. The earlier view would be, that in seeking to deal with "the balance"—i.e., so much of his estate as remained after its diminution by means of his sister's user and expenditure during her life—that sister, to whom he had given an absolute interest, would retain it. He first gives an absolute interest in his residuary estate, and then cuts it down or seeks to do so by a gift over of what is not spent by his sister during her life. On this reading of the will, the gift over would be void and inoperative, on the double ground of uncertainty and repugnancy.

But there is a later trend of decision, making for supporting such testamentary dispositions, though there are still many fluctuating opinions and divergent decisions in cases hardly distinguishable in language from each other. And all the Judges justify themselves on the ground that they are seeking to carry out the expressed or fairly inferential intentions of the testator. No doubt, the intention of the testator is the key to unlock difficulties, unless he has so expressed himself that to give effect to his words would violate a rule of law. Rules of construction may be modified so as to give effect to the real meaning and purpose of the testator.

The antinomy of judicial decision is well and briefly summarised in the last (1910) edition of Jarman, vol. 2, p. 1208: "In several cases a gift to A., with a direction that at A.'s death 'the residue' or 'whatever remains' of the property shall go to B., has been held to give A. a life interest only, while in other cases somewhat similar words have been held to give A. an absolute interest, or a life interest with a power of appointment or disposition." He cites cases of which among the first and perhaps

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the leading case is by Knight Bruce, V.-C., in 1849, *Constable v. Bull*, 3 DeG. & S. 411. In that case the testator directed his debts, etc., to be paid, and gave all his estate to his wife and at the decease of his wife whatever remained of his estate was to be equally divided between persons named. The Vice-Chancellor said: "The gift to the wife is universal in the first instance, and then follow the ulterior gifts, with the words, 'whatever remains of.' The only question seems to be, whether these three words have the effect of preventing the gift to the widow from being construed as a gift of a life interest; for, without these words, the subsequent bequests would have the effect of so reducing the interest given to the widow. There are several meanings capable of being rationally attributed to these words, which would be inconsistent with the construction giving to the widow the power of disposing of the property; and, as at present advised, I think that the other legatees have a substantial interest, and that such of them as survived the widow are entitled." On the last day of the Term, His Honour said that he remained of the opinion he had given; and a decree was made for administration.

The decision was followed in 1879 by Hall, V.-C., in *Bibbens v. Potter*, 10 Ch. D. 733, 735, and by Kay, J., in *Re Sheldon and Kemble* (1885), 53 L.T.R. 527, in which the language is similar to that of the will in hand. See *In the Estate of Lupton*, [1905] P. 321.

A strong decision in the Irish Court of *Philson v. Stevenson*, decided in 1903, is notable because the Judge below declined to follow *Constable v. Bull*, and was reversed by the Court of Appeal—FitzGibbon, Walker, and Holmes, L.JJ. The testator gave all he possessed to his wife, and at her death £50 to be paid his sister, and "if any balance" to go to his brother. Porter, M.R., held that the widow had an absolute estate, and held the subsequent provision inconsistent with such estate: *Philson v. Stevenson*, 37 Ir. L.T.R. 104—the appeal at p. 225. The Judge in Chief followed *Constable v. Bull*, and said: "The fair construction of this will is that the testator intended his wife to take and enjoy his property. That when she died £50" (of the testator's money) "should go to his sister, and *the rest*" (i.e., "the balance" of his assets after paying the £50) "to his brother." Walker, L.J., said that the respondent's construction would create a repug-

nancy, and this construction will not be given unless the Court is coerced to do so, and there was a plain construction of that will which did not create a repugnancy; and Holmes, L.J., concurred.

A like variation in a similar case is found in our Courts, but not so markedly expressed as in the Irish case cited. I refer to *Roman Catholic Episcopal Corporation of Toronto v. O'Connor* (1907), 14 O.L.R. 666: the words were: "I give . . . all my estate to my sister . . . and after the death of my said sister, I desire the remainder of my estate, if any, to be equally divided," etc. Mabee, J., held that the sister took the whole absolutely; in the Divisional Court, without deciding definitely, the Court found difficulty in following the learned Judge, and were not satisfied that the words could be successfully distinguished from those in the wills in such cases as, among others, *Constable v. Bull*, 3 De G. & S. 411.

The like diversity of opinion has extended to the Courts of Australasia: compare *In re Carless* (1911), 11 St. R.N.S.W. 388, in which Simpson, C.J. in Eq., adheres to and follows *Constable v. Bull*; and a later decision, in 1913, of A'Beckett, J., in *Wright v. Wright*, [1913] Vict. L.R. 358, in which he speaks of *Constable v. Bull* as an unsatisfactory decision, and, managing to distinguish it, gives it the go-by.

I think the weight of authority and the manifest intention of the testator to benefit the Odd Fellows, as well as his sister, lead to the conclusion that the apparently absolute gift should be cut down to a life estate.

There is, of course, the other contingency, of her marriage, to be taken into account, whereby the testator intends that her life estate may be curtailed and go over, upon her marriage, to the Odd Fellows. The validity of this condition was not discussed before me, but the point was taken and cases handed in to shew that it is void. So it appears to me, as at present advised.

In *Lloyd v. Lloyd* (1852), 2 Sim. N.S. 255, 263, Kindersley, V.-C., said: "And with regard either to his wife or to any other woman, a testator may make a gift so long as she shall remain single; but if he first gives a life estate to a single woman, a stranger to him, and then annexes a condition that in case she marries at all, it shall go over, that, being in general restraint of marriage, is not a good condition." This rule applies to mixed

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funds: *Bellairs v. Bellairs* (1874), L.R. 18 Eq. 510, 516; and to real and personal estate given together: *Duddy v. Gresham* (1878), 2 L.R. Ir. 442, *per* Christian, L.J., at p. 465. The view of Christian, L.J., was accepted and followed by Byrne, J., in *In re Pettifer*, [1900] W.N. 182.

This case exemplifies the different operation of rules of construction and rules of law. By the former, the Court is able to give effect to the intention of the testator and avoid repugnancy by making all the parts as far as possible effective; by the latter the rule of law displaces the clear intention of the testator where directions are given which would involve a condition in general restraint of marriage (with a gift over), which has been long regarded as a violation of public policy, and as such is avoided and frustrated by the law. This term of forfeiture must be, therefore, taken out of the will, and it leaves the sister, as I conceive, with an estate for life. See *Re Coward* (1887), 57 L.T.R. 285, 287, 291; *Allen v. Jackson* (1875), 1 Ch. D. 399.

There is no difficulty in the import of the direction that on the death of the sister the "balance shall revert to the Odd Fellows." "Revert" is a flexible term, and in wills frequently takes colour and import from the context. In *Jardine v. Wilson* (1872), 32 U.C.R. 498, 502, it was taken to mean "follow." As used in the will under discussion in *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 388, 393, and in the phrase that if the niece should die unmarried the £1,000 should "revert to the nephew," it was taken to indicate that the legacy was to come back or come away from the niece after she had the enjoyment of it. The same word was so read (quoting *O'Mahoney v. Burdett*) by Strong, C.J., in *Cowan v. Allen* (1896), 26 S.C.R. 292, and he said (p. 312) that it certainly implied a gift over. One of its dictionary meanings is "turn back," and that fits in very well here—"the balance shall turn back to the Odd Fellows."

Holding then that the testator gave a life estate in all his property to his sister, he would appreciate the mixed nature of his property, and that she was likely to live out of the jurisdiction of Ontario. He meant her to be well provided for out of the estate up to the date of her marriage (if she married) and, if she did not marry, till the time of her death.

The trustees desire direction as to how they shall deal with the estate in view of the life-tenant being non-resident.

There is no small difficulty in seeking to get some definite rule from the cases on the extent of the claims of the life-tenant who has special claims of near relationship on the testator. This sister, said to be about 54 years of age, is, as I understand, his only relation—the only one, at all events, whom he has recognised in the disposal of his estate. The authorities were pretty well explored in *Re Johnson* (1912), 27 O.L.R. 472, and stress was there laid on the opinion expressed by James, L.J., in *In re Thomson's Estate* (1880), 14 Ch. D. 263. He thought that the widow took an estate for life with full power of enjoying the property in specie so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie.

I incline to think that the language of this will would justify a little more liberality, which the charitable institution getting what is left should not complain about. He gives her all the residue of his estate and at her death *the unused or unexpended balance* to go over. He contemplates that she shall use and shall expend what is bestowed; to what extent? I think the whole residue may be employed so far as required for her comfortable maintenance suitable to her state in life. In other words, if necessary the capital may and should be encroached upon for the purpose of her proper maintenance, but for no other purposes.

I may refer to *Re Fox* (1890), 62 L.T.R. 762, not cited in *Re Johnson*, 27 O.L.R. 472, and also to *In re Ryder*, [1914] 1 Ch. 865, in which *In re Thomson's Estate* is commented on.

I have no doubt that the sister is entitled in specie to the money and other articles *quæ ipso usu consumantur*: see *In re Tuck* (1905), 10 O.L.R. 309, 311, 312.

As to the insurance, if that goes to the trustees under the trusts of the will, I think it should be regarded as money. She will be entitled as of course to the corpus from the debentures and the usufruct of the land.

If any difficulty arises, there will be a reference to ascertain to what she is entitled as a yearly allowance for maintenance, payable monthly or quarterly as she may wish.

But I trust this may be avoided. The charitable beneficiaries, through their counsel, manifested a liberal attitude towards the

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sister; and I hope an amicable arrangement will be arrived at by which she will be satisfied and amounts fixed which may be presently paid to her and to the charity. The costs of all parties out of the estate.

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[APPELLATE DIVISION.]

ROBINSON V. MOFFATT.

Vendor and Purchaser—Agreement for Sale of Land—Judgment for Specific Performance—Objections to Title—Incumbrances—Restrictive Building Conditions—Execution against Lands of Vendor—Execution Act, secs. 10, 11—Land Titles Act, sec. 62 (1)—Costs.

Specific performance of a contract for the sale and purchase of land having been awarded in favour of the plaintiff, the purchaser, by the judgment reported in 35 O.L.R. 9, the question whether the defendant, the vendor, could convey the land to the plaintiff in fee simple, free from incumbrance, came before the Court for determination:—

Held, that the restrictive building conditions with which the land was burdened, having been originally set up, unsuccessfully, by the plaintiff, as a ground for escaping from the contract, and a judgment for specific performance having been taken, the plaintiff could not again set them up as a reason why the defendant could not convey free from incumbrances.

A writ of *fi. fa.* against the goods and lands of the defendant was placed in the sheriff's hands for execution after the contract was made, but at a time when the greater part of the purchase-money was unpaid:—

Held, that the plaintiff could not be compelled to take the land until the effect of the *fi. fa.* was removed.

Parke v. Riley (1866), 3 E. & A. 215, explained.

Per MASTER, J.:—The words of secs. 10 and 11 of the Execution Act, R.S.O. 1914, ch. 80, when read in their ordinary and natural meaning, applied to make the *fi. fa.* bind the interest of the vendor, in the circumstances shewn; and that view was not weakened by the words of the Land Titles Act, R.S.O. 1914, ch. 126, sec. 62, sub-sec. 1.

Special order as to costs.

MOTION by the plaintiff for further relief in pursuance of the judgment of a Divisional Court of the Appellate Division of the 26th November, 1915 (35 O.L.R. 9), and for judgment for the plaintiff with costs throughout.

This motion first came before the Court on the 13th March, 1916, when a reference was directed to the Master in Ordinary to ascertain and state whether the defendant could make a good title to the lands in question and convey to the plaintiff, and, if so, when.

On the 24th March, 1916, the Master reported that the defendant was able, on and at any time after the 2nd March, 1916, to make a good title and convey to the plaintiff.

The plaintiff (by leave) appealed from the report, and renewed his motion for judgment.

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April 12. The appeal and motion were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. J. Gray, for the plaintiff, argued that the defendant was not yet in a position to give the plaintiff a good title to the lands in question: first, because of the restrictive covenants in existence: *Re Hunt and Bell* (1915), 34 O.L.R. 256; and, secondly, because of a writ of *fi. fa.* against the lands of the vendor in the sheriff's hands: *In re Cox & Neve's Contract*, [1891] 2 Ch. 109; *Cato v. Thompson* (1882), 9 Q.B.D. 616; *Parkes v. Sanderson* (1911), 18 O.W.R. 368, 2 O.W.N. 586.

W. E. Raney, K.C., for the defendant, contended, as to the first ground set up by the plaintiff, that the plaintiff, having relied on the existence of the restrictive covenants to get rescission of the contract, could not now use them to support an argument in favour of specific performance. As to the second contention of the plaintiff, the case of *Parke v. Riley* (1866), 3 E. & A. 215, was authority for the proposition that where a vendor has made an agreement to sell, and a writ issues against his lands before conveyance, the writ does not bind the legal estate in his hands, and a sale thereof by the sheriff under the writ passes nothing. This is stated to be the law in *Armour on Titles*, 3rd ed., p. 179. See also *In re Trusts Corporation of Ontario and Boehmer* (1894), 26 O.R. 191. The purchaser knew of the restrictive covenants, and took subject to them: *Armour on Titles*, 3rd ed., p. 96.

Gray, in reply, said that, owing to an amendment to the Execution Act (now R.S.O. 1914, ch. 80, secs. 10 and 11), *Parke v. Riley* was not applicable.

April 28. MEREDITH, C.J.C.P.:—This motion—which it is to be hoped may bring to an end this prolonged litigation over a simple contract for the sale and purchase of the land in question—is made for the purpose of having a determination of the question whether the vendor can now give to the purchaser that which he sold to him, namely, the land in question in fee simple free from incumbrance.

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The purchaser contends that he cannot, for two reasons: (1) because there are some restrictive building conditions with which it is burdened: and (2) because of a writ of execution against the goods and lands of the vendor, now in the hands of the sheriff of the county in which the land is, for execution, in full force and virtue.

As to the first of these reasons, it is enough to say: that this action was brought by the purchaser to set aside his agreement to purchase, on the ground, among others, that the vendor could not convey to him, as agreed, because of these very restricting conditions: that ground of action, and all others upon which the purchaser sought to escape from the agreement, failed, and, with his consent, indeed at his request, a judgment for specific performance was made upon an appeal from the judgment at the trial. There is no ground for any contention, and none such is made, that the purchaser did not fail altogether on all grounds upon which he sought to get rid of his agreement to purchase, or that there was any intention to refer to a Master of the Court the question whether or not the vendor could convey free from the restrictive conditions. If the judgment made upon the appeal were signed in proper form, all that branch of the purchaser's action should have been dismissed; but, however that may be, the purchaser cannot seek the benefit of this ground of action a second time, here. It is said, and not denied, that the restrictions are beneficial altogether to the purchaser, and doubtless that circumstance accounts for the claim made to set aside the agreement, because of them, having been abandoned, and a judgment for specific performance having been taken.

On the other ground, the contention of the purchaser seems to me to be, plainly, right, that is: that he cannot be compelled to take the land in question until the effect of the *fi. fa.* is removed.

The writ was placed in the sheriff's hands for execution long after the agreement in question was made; but the greater part of the purchase-money is yet unpaid; and the question which seems to have given trouble to the Master, to whom it was referred to ascertain and state whether a conveyance could be made, namely, what effect, if any, the writ of execution has upon the vendor's power to convey, seems to me to be one easily answered, and in respect of which the reason for the answer easily can be given.

Both at law and in equity, the vendor is the owner of the land in the sense of having the lawful title to it; the purchaser has only an equitable right to it; but, to that extent, if the agreement be carried out, is treated in equity as substantially the owner, the real owner, or formal owner, if you choose to call him such, though that would not be strictly accurate; the vendor is a trustee for the purchaser, but bound to convey to him only on fulfilment by the purchaser of all things agreed to be done, on his part, before getting the conveyance. An agreement may never be carried into effect, it may end in nothing by various ways, and it may be that Equity, however measured, may refuse specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have: he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract.

That being so, on what ground, or with what reason, can it be urged that an execution creditor of the vendor cannot acquire any charge upon the land, though a purchaser from the vendor would acquire right and title? He cannot, of course, acquire any higher right than his debtor had; but why not that much? I have no manner of doubt that the execution creditor, assuming that his execution is valid, has such a right in the land in question, but of course to be worked out in the regular way by sheriff's sale of the judgment debtor's interest in the land. In a case in which the judgment debtor has no real interest in the legal estate in the land, as, for instance, if all the purchase-money had been paid, or validly assigned before the writ took effect, the execution could not stand, substantially, in the way of a conveyance to the purchaser free from incumbrance: and all this seems to me to be quite in accord with the judgment of the Court of Error and Appeal of this Province in the case of *Parke v. Riley*, 3 E. & A. 215: whilst, if the views of the dissenting Judge in that case could be accepted, the same result should follow now, even if it could not, as he contended, then. That view was that vendor and purchaser must, in all things and inflexibly, be looked upon as mortgagee and mortgagor: and of course in some respects they are in equity substantially the same; and in some cases,

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for some special purposes, expressly they have been made so, by legislation: see the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 14 (2). And, since the case of *Parke v. Riley*, the scope of the Execution Act has been widened from time to time, and is now so comprehensive that the dissenting judgment in that case, even if it had been the judgment of the Court, might not govern the question now involved in this case: see *McPherson v. Temiskaming Lumber Co. Limited*, [1913] A.C. 145.

This view of the matter is one which makes care on the part of a purchaser of lands, before parting with his purchase-money, necessary: but that is a care which, I have always understood, was and is well-known to be necessary; hence searches in the sheriff's office for executions, which have always, I have thought, been the general practice.

Upon the vendor clearing the way to a conveyance of the land free from all incumbrances, within 10 days, the transaction should be closed; and in that event the vendor should pay all costs subsequent to the judgment for specific performance, to be set off against the costs now payable, under that judgment, by the purchaser to the vendor: otherwise there should be the usual judgment upon the failure to convey after reference; and the vendor should pay all costs subsequent to the judgment for specific performance, but not the costs prior to that, because that judgment was made on the terms of payment of such costs, and these costs should be set off against the costs awarded to the purchaser, and, if there be a balance in the vendor's favour, the amount of it may be deducted from the purchase-money to be returned.

LENNOX, J.:—I agree.

RIDDELL, J.:—This is another—it is to be hoped the final—act in this Comedy of Errors, which, however amusing to the on-lookers, will probably not prove to be very gratifying to the actors—the previous proceedings will be found reported in 35 O.L.R. 9.

The plaintiff, then an infant of eighteen years, with an eye to business and of some experience, bought of the defendant certain land, to be paid for in instalments. The value of land went down, and the infant, with infantile notions of honesty, served notice

that he repudiated the contract—the defendant would not consent to the cancellation of the contract, and the plaintiff, still an infant, brought an action for the return of the money already paid.

In his statement of claim, he alleged: (1) that the defendant had not the title to the lands; (2) that the plaintiff had tendered the remainder of the purchase-money necessary to entitle him to the deed, and the defendant refused to accept; (3) that the lands were subject to onerous building restrictions; and (4) that the plaintiff was an infant and had repudiated the contract. (Of these Nos. 1 and 4 were in the original statement of claim and Nos. 2 and 3 by amendment more than a month thereafter.) The claim was originally for the return of the money paid, damages, &c., but, by amendment, a claim was made in the alternative for specific performance.

At the trial, judgment was given dismissing the action, but giving the plaintiff the privilege, if he saw fit, on paying the defendant's costs, to have judgment for specific performance (the reason of this direction as to costs being that the defendant early in the case offered specific performance and the plaintiff's costs up to that time).

The plaintiff declined to take advantage of this provision, and the judgment went dismissing the action (see 35 O.L.R. at p. 12). An appeal was taken; and the Appellate Division thought it should be dismissed; but, the defendant consenting, the direction was given (35 O.L.R. at p. 16) that, upon payment of all costs, including the costs of the appeal, the plaintiff might have specific performance.

It should be sufficiently obvious to any one what was meant by the Court—if the plaintiff should elect to pay and should actually pay the costs, he should have the ordinary judgment for specific performance: if not, the appeal would simply be dismissed with costs.

The plaintiff elected to take advantage of the privilege given him; he apparently led the defendant's solicitor to believe that he was going to pay the costs—at all events the defendant's solicitor did not insist on the payment of costs before the judgment should be taken out. (It is not in a usual form, but it is not necessary at this stage to refer to its contents.)

The plaintiff then made a tender of the amount of the costs

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and of the balance of the purchase-money and demanded his deed—the deed tendered not being such as he considered himself entitled to, he did not hand over the money.

Then he moved this Court for relief, alleging that the defendant could not make title; the defendant contended that he could; and we sent the matter to the Master to determine if title could be made. The Master reported that a good title was shewn: the plaintiff was not satisfied with this report, and it was agreed by all parties that we should hear an appeal from the report as though it had come regularly before us; and at the same time dispose of the plaintiff's motion for relief—this is the present motion.

There are two objections to the title taken by the plaintiff: (1) certain building restrictions; and (2) a *fi. fa.* lands.

As to the first, without expressing any opinion on the Master's reasons, I think that the plaintiff cannot be heard to urge these restrictions; in his statement of claim he alleges (para. 8): "The said lands were sold to the defendant subject to onerous building restrictions;" this was set up as a ground for the return of his payments already made, i.e., a rescission of the agreement, and it failed. With this knowledge, the plaintiff accepted a judgment for specific performance, and it is not now open to him to say that these restrictions are a ground for non-performance of his contract.

Moreover, in the judgment of the Divisional Court as entered there is a declaration by the Court "that the plaintiff has accepted the title of the defendant to said lands and premises."

While this might not affect an objection made by matter subsequent, it must oust any objection based on existing and known defects.

The second objection is not in the same position — there is an execution against the lands of the defendant for over \$4,500, as appears by the certificate of the Deputy Master of Titles.

Reading between the lines, I should gather that it was on the discovery by the plaintiff or his solicitor of this writ, that the plaintiff decided to take a judgment for specific performance — however that may be, it is found and admitted that the writ was lodged after the contract was made specific performance of which is decreed—not till the 17th January, 1916, in the office of the Master of Titles; the 9th December, 1915, with the sheriff—and also that it was not known to the plaintiff until after the judgment.

If then the writ is an effective bar to the defendant making title, the plaintiff should *primâ facie* have relief.

The case of *Parke v. Riley*, 3 E. & A. 215, was pressed upon us as decisive in favour of the defendant's contention—and, if it were in point, that would be so. While I had some trouble in the consideration of the resemblances and differences of the two cases, I think the Chief Justice has come to the proper conclusion. If this be not the law as the Legislature wishes it to be, it can readily be changed by the Sovereign body.

I therefore agree in the disposition of the case proposed by my Lord.

MASTEN, J.:—I have had the advantage of perusing the reasons for judgment prepared by the Chief Justice of this Divisional Court and also the reasons of my brother Riddell. The facts have been so fully and so lucidly stated by them that I need not repeat them.

I agree in the conclusions at which the Chief Justice has arrived.

I do not think that the principle of *Parke v. Riley*, 3 E. & A. 215, is at variance with this conclusion. At p. 228, Draper, C.J., says: "I understand the decision of His Honour Mr. V.-C. Mowat to be rested on this ground: that the Andrews were bound by contract to convey to Riley, who was bound to reconvey to them by way of mortgage; that in the view of a Court of Equity Riley thus became equitable mortgagor, and the Andrews (the vendors) equitable mortgagees, and, inasmuch as if they had been legal mortgagees their estate and interest would not be saleable under a *fi. fa.*, so neither can the land of which they are equitable mortgagees be sold, though they are seized of the legal estate. There is some analogy between the cases, but to me it seems imperfect, and the possible mischief of such a determination is, in my humble judgment, so apparent that I should, even under the pressure of the most direct authority, reluctantly adopt the conclusion. I have not, however, found any such authority."

After further discussing the matter he continues, at p. 229: "It is, however, unnecessary to pursue this discussion, as I have arrived at the conclusion that, in fact, the Andrews had parted with their interest in the unpaid purchase-money due by Riley to the de-

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fendant Smith, before the plaintiff's execution could bind their lands or their interest in them."

The judgment proceeds on the ground last stated, and the above quotations indicate that the basis of the decision was the fact that the Andrews had—before the *fi. fa.* was lodged with the sheriff—assigned to Smith the whole balance of the purchase-moneys coming to them, so that, when the writ in question was placed in the sheriff's hands, they had no beneficial interest, and were bare trustees of the legal estate. My understanding of that case is that, if the facts had there been the same as the facts of this case, the judgment of Draper, C.J., concurred in by Richards, C.J., and by Hagarty, J., would have been that the execution was effective against the lands.

If, as I think, the reasoning in *Parke v. Riley* is in favour of rather than against the purchaser's contention, then it seems to me that the words of secs. 10 and 11 of the Execution Act, R.S.O. 1914, ch. 80, when read in their ordinary and natural meaning, apply to make the *fi. fa.* bind the interest of the vendor, under the circumstances here shewn.

This view is not weakened by the words of the Land Titles Act, R.S.O. 1914, ch. 126, sec. 62, sub-sec. 1. That section, after providing for the transmission by the sheriff to the Master of Titles of a copy of the writ of *fi. fa.*, goes on to provide that "after the receipt by him" (the Master of Titles) "of the copy no transfer by the execution debtor shall be effectual, except subject to the rights of the execution creditor under the writ."

For these reasons, the objection of the purchaser to the conveyance seems to me to be effective, and I concur in the judgment proposed by the Chief Justice.

Judgment accordingly.

[APPELLATE DIVISION.]

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April 20.

NAEGELE v. OKE.

Contract—Permission to Draw Water from Neighbouring Land—Construction of Written Agreement—Easement—Lease—Right in Gross—Personal License not Binding Land—Registry Act—Notice—Agreement between Strangers to Title.

The owner of a farm (lot 14) having a spring upon it, by an oral agreement, made in 1903 or 1904, with F. N., the son of the owner of the adjoining farm (lot 13), permitted him to put in an hydraulic ram at the spring and to convey water from the spring to lot 13. The ram was put in and was used from 1903 until September, 1911, when the husband of the owner of lot 14 signed a written memorandum as follows: "The undersigned agrees to lease hydraulic water privilege on part of lot 14 . . . for 49 years, to F. N. . . . and also privilege of making any repairs on said privilege without damage to crop and also that undersigned to have privilege of using waste water to be taken by him to his property." The use of the ram was continued. F. N.'s father died in 1912, and F. N. became the owner of lot 13; in 1915, he made an agreement for the sale of it to P., who took possession. In April, 1915, the owner conveyed lot 14 to the defendant, who prevented P. from using the ram and the water; and this action was thereupon brought by F. N. and P. to establish their right and for damages:—

Held, that the agreement was a license, a personal license which did not bind the land nor the defendant.

Per MEREDITH, C.J.C.P., and MASTEN, J.:—The agreement was not to be construed as a lease or an easement; and, if a right in gross only, would not be assignable.

Per MEREDITH, C.J.C.P.:—The title to lot 14 was a registered title, and the defendant, being the duly registered owner, was entitled to the protection which the Registry Act affords, except in so far as he had actual notice of any adverse right; he had actual notice of the written agreement, but was not chargeable with notice of anything beyond what the writing conveyed, and that was nothing affecting the title of either farm—neither of the parties to the writing had any estate or interest in either farm.

The judgment of the Judge of the County Court of the County of Huron was reversed, and the action dismissed.

AN appeal by the defendant from the judgment of the Judge of the County Court of the County of Huron in an action in that Court, brought by Francis Naegele and Daniel Pitblado, to obtain a declaration of their right to maintain an hydraulic ram upon and take water from the land of the defendant, Charles F. Oke, for the restoration of the ram to working order, and for damages. The judgment of the County Court Judge declared the plaintiffs' right to the easement claimed, granted an injunction restraining the defendant from interfering therewith, and awarded the plaintiffs \$10 damages and the costs of the action.

April 12. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

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C. Garrow, for the appellant, said that the Statute of Frauds had been pleaded, and contended that a deed was necessary to pass an incorporeal hereditament affecting land: *Wood v. Lead-bitter* (1845), 13 M. & W. 838, at pp. 841 to 844; *Cocker v. Cowper* (1834), 1 C. M. & R. 418. The right claimed here, therefore, could not be enforced as an easement. If it was intended to operate as a license only, it was revocable, and was revoked by the sale made to the defendant: *Ross v. Fox* (1867), 13 Gr. 683; *Hurst v. Picture Theatres Limited*, [1915] 1 K.B. 1; *Kerrison v. Smith*, [1897] 2 Q.B. 445. It was not a lease, because the plaintiff Naegele had never acquired the exclusive possession of the Halliday lands: *Hodson v. Heuland*, [1896] 2 Ch. 428. The defendant could not be bound by notice of the written agreement between Francis Naegele and John Halliday, as neither of them had any interest in the Halliday lands, and the defendant was entitled to the protection of the Registry Act as to notice: *Castle v. Wilkinson* (1870), L.R. 5 Ch. 534. Specific performance of the original verbal agreement could not be granted because of the uncertainty of its terms: *Marshall v. Berridge* (1881), 19 Ch. D. 233. The license was a personal one, granted by the Hallidays to Naegele, and did not bind the land.

W. Proudfoot, K.C., for the plaintiffs, respondents, argued that the judgment appealed from was right, and should be affirmed. If an easement had not been created by the original arrangement between the Hallidays and Francis Naegele, there had been an agreement to grant an easement, and this could be enforced in equity, even if not by deed: *Goddard's Law of Easements*, 6th ed., pp. 126, 127; *Craig v. Craig* (1878), 2 A.R. 583. He also referred to *Allen & Sons v. King*, [1915] 2 I.R. 213, and *Connor-Ruddy Co. v. Robinson-Whyte Co.* (1909), 19 O.L.R. 133, on the question of license, and contended that the defendant was bound by notice of the agreement.

April 20. *MASTEN, J.*:—In the year 1903 or 1904, Charlotte Ophelia Halliday owned and occupied (along with her husband, John Halliday) lot 14 in the 3rd concession of the township of Colborne, in the county of Huron, fronting on the Maitland river, and one Joseph Naegele was the owner of the adjoining lot, known as lot 13. Francis Naegele, one of the plaintiffs, was the son of Joseph, and at that time lived with his father on lot 13. The

Hallidays and the Naegeles had been neighbours for years, and were on good terms. In 1903 or 1904, an oral agreement was made between the plaintiff Francis Naegele and Mr. and Mrs. Halliday, licensing Francis Naegele to put in an hydraulic ram at a spring situate on the Hallidays' lot, and, by means of the ram, convey the water from the spring to the farm buildings on the Naegele farm. The account of this verbal arrangement is detailed by the plaintiff Francis Naegele in his evidence as follows:—

"A. The way I came to put in the hydraulic, the well I used for my stock caved in, and I came into town here. Halliday had moved into Goderich, and he was there himself and his wife, and I asked him about the use of the spring on his bank, and the proposition he had made to me several years before, that any time I wanted to use it I was welcome to do so; it was no use to him where it was, and he might make some use of it if I made use of it. I asked him if I could have the use of this spring, and what he wanted for it, and he said, 'I don't want anything for it;' and Mrs. Halliday spoke up and said, 'We don't want anything for the water—it is no use for us where it is.' John himself said he would reserve the right to the waste water to use it in the west field. His tenant had leased the place for three years, but he was going to seed down and pasture the farm, and the waste water was more than a consideration to him if he could get it in the corner of the field. I told him if I couldn't get water enough to drive the hydraulic I wouldn't put it in, but I found enough water to drive the hydraulic, and I sent for the piping and installed the hydraulic, and there was nothing more said about the hydraulic. It was used from 1903 until September, 1911.

"Q. You used it all of these years and up to that time there was no writing between you? A. Nothing at all, just that verbal agreement."

On the 29th September, 1911, the Hallidays were about to put up their farm for sale at auction, and, in order to confirm and protect the continued use of this ram and of the spring water, the following agreement was signed:—

"Goderich, September 29th, 1911.

"The undersigned agrees to lease hydraulic water privilege on part of lot 14, township of Colborne, county of Huron, for

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49 years, to Frank Naegele, of Colborne Tp., and also privilege of making any repairs on said privilege without damage to crop and also that undersigned to have privilege of using waste water to be taken by him to his property.

"John Halliday."

The Halliday farm was not sold at the auction sale, and nothing further transpired at that time. On the 11th August, 1912, Joseph Naegele died, leaving a will by which he devised all his lands to his wife Albertine for life and after her death to his son Francis, the plaintiff. After the plaintiff Francis Naegele became the owner of the property under his father's will, and some time about April, 1915, he made an agreement for the sale of his farm to his co-plaintiff, Pitblado, the latter being his son-in-law. Though no deed has yet passed, both parties (Naegele and Pitblado) agree that the agreement of sale is effective and is to be carried out. Pitblado is in possession of the lands. On the 17th April, 1915, Mrs. Halliday conveyed lot 14 to the defendant, Oke. Oke, in the month of May last, prevented the further use of the ram and of the water, and this action was thereupon launched to establish the plaintiffs' right and for damages.

The learned County Court Judge in his judgment has maintained the plaintiffs' claim.

On the argument before this Court many interesting and important questions were raised, some of which do not appear to have been presented before the trial Judge.

It is important, in dealing with this appeal, first to ascertain within what legal category the rights of the parties fall.

Is the right claimed an easement, a lease, or a license?

It is of the essence of an easement that a dominant tenement be specified, and that the grantee of the easement shall have an estate or interest in the dominant tenement at the time of the grant: *Rymer v. McIlroy*, [1897] 1 Ch. 528.

No authority need be quoted for the proposition that there cannot be an easement in gross.

It is manifest, therefore, upon the facts as above stated, that the interest in question is not an easement.

Neither can the arrangement be construed to be a lease, though the parties so characterise it, for it is of the essence of a lease that the lessee acquire the exclusive possession of the leased

premises: *Watkins v. Milton-next-Gravesend Overseers* (1868), L.R. 3 Q.B. 350; *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405.

No exclusive possession of any part of Halliday's lands was acquired by Naegele.

In *Ward v. Day* (1863), 4 B. & S. 337, it was held that a license to get all the copperas stone which might be found in part of a manor for twenty-one years at the yearly rental of £25 was not a demise and would not support a distress for rent.

In *Stockport Water Works Co. v. Potter* (1864), 3 H. & C. 300, it was held that the grant by a riparian proprietor of a right to take water from a natural stream on which his land abutted operated as a license in gross, and not as a mere demise, and would not enable the grantee to maintain an action in his own name against a wrong-doer.

The written agreement of September, 1911, is, I think, to be construed as relating to the existing ram and pipes and to their then use for supplying water to lot 13. The evidence shews clearly that it was drawn to confirm and continue that which had been in existence and in actual use under an oral agreement for seven or eight years, and was not a general right to take water. That which the plaintiff Naegele acquired under his agreement with the Hallidays was, therefore, I think, a license personal to himself, good for 49 years, subject to earlier determination by his death, or because he was no longer in occupation of the Naegele farm, so as to enable him to enjoy the benefits of the license.

No estate in the lands of Halliday (or Oke) was acquired by Naegele. The license does not include "assigns," and so was not transferable.

At the time this action was instituted, Francis Naegele had sold the lands to which the hydraulic ram conveyed the water, and Pitblado, the purchaser, was in possession, so that, on the date when the writ was issued, he (Francis) had no rights capable of enforcement by the Court.

As Naegele's interest amounts only to a personal license by his grantors and not to any estate or interest in the lands of his grantors, I do not think that Oke was in any way bound (even with notice) by the license granted by his predecessor in title. The right was a personal right given by the Hallidays to Naegele. Not being an interest in the lands, Oke on his purchase took the land clear of any right or license.

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The result is, that Naegele's enjoyment of the personal right given him by the Hallidays has been interrupted. But that gives him no claim against Oke, who bought the lands clear and free of any claim against them.

If Naegele has any claim, it is not against Oke, but against Mrs. Halliday. This action, being against Oke, must be dismissed.

If Naegele were to sue Mrs. Halliday for breach of agreement, he must also fail, on the ground first mentioned.

It is therefore unnecessary to consider other interesting and important questions raised on this appeal—which should be allowed and the action dismissed.

A reasonable time should be allowed in which to permit the parties to adjust themselves to the changed situation arising from this judgment.

The judgment of this Court should therefore not issue for six months, and meantime the rights of the parties should continue as under the judgment of the trial Judge, with the right to the plaintiffs to remove the ram during that period.

RIDDELL, J.:—I agree, but I should prefer to put the judgment on the ground that at the most the license was a personal license by Halliday, and did not at all bind the land.

LENNOX, J.:—I agree, and adopt the ground stated by my brother Riddell.

MEREDITH, C.J.C.P.:—I am quite in accord with my brother Masten in regard to the proper judgment to be pronounced on this appeal, as set out in his opinion; but, as we are overruling the judgment of a Local Judge of much experience, upon a subject of litigation somewhat infrequent in the Courts of this Province—so infrequent that I can recall to memory but one case of the kind within recent years; a case tried at Chatham in the autumn of the year 1914; and a case which was fully argued in all its aspects but went off on a narrow ground*—I feel in duty bound to add something to that which that learned Judge has said.

It must not be forgotten that the title to the land in question is a registered title, and that the defendant, being the duly regis-

**Milner v. Brown* (1914), 7 O.W.N. 303.

tered owner of the land, is entitled to the protection which the Registry Act affords, except in so far as he had actual notice of any adverse right; and the actual notice which the defendant had was of the Halliday-Naegele agreement in question, and so he is in the same position as, but not worse in any way than, if that agreement had been registered: he is not chargeable with any notice beyond that which the writing conveys: and that is really nothing affecting the title to the land in question, or the adjoining Naegele farm to which the water in question is conveyed: because neither party to the writing had any estate or interest in either farm; it is an agreement between persons strangers to such titles. If it be so that either owner—at the time the agreement was made—is estopped from denying that some right in the lands was given by the writing, or if it be that the parties to it were really the agents of the owners, acting for them in the making of it; or if it be that there was a prior verbal agreement between the owners, or those representing the owners, of which specific performance might be adjudged, the defendant had no notice of such things, and so they cannot be urged as against his registered title: and so, whatever might have been the effect, if any, of the writing, as between the owners of the two farms, at the time it was signed and delivered, or of any other unwritten agreement, it does not affect the defendant's registered ownership.

I agree that the writing would not, if made by the owner, effect a demise of any part of the farm in question: there is no rent reserved; the possibility, depending on Naegele's willingness, and other chances, of Halliday getting some "waste water" is very far removed from the annual certainty of even a peppercorn. Nor could it create an easement, in the strict sense of the term "easement;" and, if a right in gross only, would not be assignable: see *Ackroyd v. Smith* (1850), 10 C.B. 164, and *Thorpe v. Brumfitt* (1873), L.R. 8 Ch. 650; and, as the right is to be used only in connection with land in which the owner of the right has now no substantial interest, I am unable to imagine any kind of legal or equitable right the plaintiffs can have against the defendant, under the writing in question, enforceable in this action.

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[APPELLATE DIVISION.]

March 27.
April 28:

FOSTER v. MACLEAN.

Libel—Newspaper—Conspiracy—Pleading—Defences—Agreement for Rightful Purpose—"Fair Comment"—Inducement—Payment into Court—Amends—Libel and Slander Act, secs. 7, 8, 9—Particulars—Appeals in Matters of Practice—Costs.

In an action against the editors and publishers of a newspaper, begun as an action for libel, as shewn by the endorsement of the writ of summons, the statement of claim contained charges of conspiracy, and set forth words published concerning the plaintiff in the defendants' newspaper, reflecting upon his character and conduct, in connection with his candidature for municipal office, stating that they were published in furtherance of the alleged conspiracy to defame the plaintiff and prevent his election to office. A statement of defence having been delivered, the plaintiff moved to strike out parts of it; the motion was dismissed by the Master in Chambers; the plaintiff appealed; MULOCK, C.J.Ex., dismissed the appeal, but ordered particulars of the 4th paragraph; and the plaintiff appealed to a Divisional Court.

Paragraph 4 of the statement of defence was to the effect that the plaintiff was not a desirable person for the office which he sought, that it was not in the public interest that he should be elected, that the electors were opposed to his election, that the defendants desired, in the public interest, to secure his defeat, and therefore endeavoured *bonâ fide* and without malice and without conspiracy with any other person to prevent the election of the plaintiff:—

Held, that this was no defence to an action for conspiracy—it did not raise an issue as to whether the acts to be done were according to law. If it was intended to be a plea to damages, it should so state specifically; and, if it was intended to make the allegations part of the defence of "fair comment," they should be pleaded properly and specifically in that way.

Paragraph 6 (a) was to the effect that the plaintiff had invited public criticism in relation to his candidature:—

Held, that this, while not a defence *per se*, contained matter of inducement, and was not objectionable.

And *held*, that para. 6 (e), being the ordinary defence of fair comment, was not objectionable. The plaintiff was entitled to particulars under that defence.

If the paragraphs complained of could be pleaded in a libel action proper, they were not wrong in an action for conspiracy.

By para. 8, the defendants, by way of alternative defence, and while denying any liability, said that \$5, which sum they brought into Court, was sufficient to satisfy the plaintiff's claim:—

Held, by MULOCK, C.J.Ex., in Chambers, that secs. 7 and 8 of the Libel and Slander Act, R.S.O. 1914, ch. 71, applied to this action, and the defendants, as authorised by sec. 9, were entitled, with their defence, to pay money into Court by way of amends; and this paragraph was not objectionable.

Held, also, that statements in the particulars delivered by the defendants by which they assumed to reserve a right to deliver further particulars were of no avail to the defendants; they might properly be stricken out; but they did not prejudice the plaintiff; and there was no reason why further time for delivering particulars should not be allowed.

The plaintiff abandoning the claim for conspiracy made in the statement of claim, it was ordered that the statement of claim should be amended so as to confine it to libel, conforming to the endorsement on the writ.

Remarks upon the forms of pleading in conspiracy and libel and reference to authorities.

The order of MULOCK, C.J.Ex., was varied, but no costs of the appeal were allowed as between the parties.

Per MEREDITH, C.J.C.P.:—Appeals in regard to matters of practice and pleading such as those involved in this case are of no real benefit, and should not be encouraged.

AN appeal by the plaintiff from an order of the Master in Chambers dismissing an application made by the plaintiff for an order striking out certain paragraphs of the statement of defence of the defendant Smythe, in an action for libel.*

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*The statement of claim was in part as follows:—

1. The plaintiff was a Controller of the City of Toronto for the year 1915 and is a Controller of the City of Toronto for the year 1916, and the defendants were during the year 1915 and still are the editors and publishers at the city of Toronto of the daily newspaper known as "The Toronto World."

2. In the month of December, 1915, and on the 27th day of the said month of December, and subsequently thereto until and including the 1st day of January, 1916, the plaintiff was a candidate for a public office in Ontario, to wit, for the office of Controller of the City of Toronto, and the plaintiff was re-elected to the said office on the said 1st day of January, 1916.

3. During the said month of December, 1915, the defendants joined and conspired together, and with other persons whose names are to the plaintiff at present unknown, to defame the plaintiff in his character and reputation and to prevent his re-election as a Controller of the City of Toronto.

4. In pursuance of the said object and in furtherance of the said conspiracy, on the said 27th day of December, 1915, the defendants jointly and each separately falsely and maliciously wrote, printed, and published (or caused to be written, printed, and published) in the said newspaper of and concerning the plaintiff, and of and concerning the plaintiff in connection with his candidature for the said public office, the words following that is to say: "Controller Foster never had an original idea in his life. He depends not on his brains for success but on cash. He is, in other words, deficient in all things but dough, and as a dough-bag he believes he is a conspicuous success. At any rate his dough sticks. It does not flow over the tub."

5. In pursuance of the said object and in furtherance of the said conspiracy, on the 29th day of December, 1915, the defendants jointly and each separately falsely and maliciously wrote, printed, and published (or caused to be written, printed, and published) in the said newspaper of and concerning the plaintiff, and of and concerning the plaintiff in connection with his candidature for the said public office, the words following that is to say (setting out further words reflecting upon the plaintiff's character and conduct).

6. In pursuance of the said object and in furtherance of the said conspiracy, on the 31st day of December, 1915, the defendants jointly and each separately falsely and maliciously wrote, printed, and published (or caused to be written, printed, and published) in the said newspaper of and concerning the plaintiff, and of and concerning the plaintiff in connection with his candidature for the said public office, the words following that is to say (setting out further words reflecting upon the plaintiff's character and conduct).

7. The said words so falsely and maliciously written, printed, and published in the said newspaper as aforesaid were written, printed, and published by the defendants with the intent to defame the plaintiff both in his private capacity and as a candidate for a public office and to hold him up to public ridicule and contempt, and were in fact libellous and defamatory of the plaintiff.

The statement of defence of the defendant Smythe was as follows:—

1. The defendant Smythe is an editorial writer employed by the defendant the World Newspaper Company of Toronto Limited, but he is not the publisher of the newspaper known as "The Toronto World," nor is he interested in such publication, or in the defendant company, save as aforesaid.

2. This defendant admits that the plaintiff was a candidate for re-election as Controller of the City of Toronto in the month of December, 1915.

3. This defendant denies that he joined and conspired with his co-defendants, or with other persons, to defame the plaintiff in his character and reputation, or to prevent his re-election as a Controller of the City of Toronto.

4. This defendant says that the plaintiff was and is not a desirable person for Controller, and it was not in the public interest that the plaintiff should

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March 24. The appeal was heard by MULOCK, C.J.Ex., in Chambers.

E. F. Raney, for the plaintiff.

K. F. Mackenzie, for the defendants.

March 27. MULOCK, C.J.Ex.:—During the argument I disposed of all the questions except that arising under the 8th paragraph of the defendant's statement of defence. That paragraph is as follows: "This defendant, by way of alternative defence as to the whole action, and while denying any liability,

be re-elected as a Controller of the City of Toronto, and that a large body of the Toronto electorate to which the plaintiff was appealing in the said election was opposed to his election, and that the Toronto "World" newspaper desired in the public interest to support those opposed to the plaintiff and to secure his defeat, and that therefore he endeavoured *bonâ fide* and without malice and without conspiracy with any other person to prevent the election of the plaintiff to that office.

5. In such endeavour, and not as alleged in the plaintiff's statement of claim, this defendant admits that he wrote and caused to be published in the said Toronto "World" newspaper a series of articles in opposition to the plaintiff's candidature for the office of Controller as aforesaid, of which series the words complained of in the statement of claim formed a small part.

6. For a further defence to the plaintiff's claim, this defendant denies that the words alleged by the plaintiff to have been written, printed, and published in the said newspaper in pursuance of the said object and in furtherance of the said conspiracy, as set out in the 3rd, 4th, 5th, and 6th paragraphs of the statement of claim, were, as alleged in the 7th paragraph of the statement of claim, libellous and defamatory of the plaintiff, on the following grounds:

(a) The plaintiff, during the month of December, 1915, and from the 20th December, 1915, to the 1st January, 1916, inclusive, advertised largely in said Toronto "World" newspaper and in other newspapers published in Toronto, and spoke from public platforms at public meetings throughout Toronto, and invited public attention to and public criticism upon his views on the questions at issue in the said election and upon his past personal conduct and record in relation to his office as a member of the Corporation Council of Toronto, and his own qualifications for the office of Controller as aforesaid, the plaintiff being then a candidate for the public office of Controller as aforesaid.

(b) The words complained of formed part of articles dealing with the candidature of the plaintiff as aforesaid, the said advertisements of the plaintiff, and with his said public utterances, and the words complained of were fair and *bonâ fide* comments upon matters of public and general interest and were published *bonâ fide* and for the benefit of the public and not otherwise, and without any malicious intent or motive whatever.

(c) This defendant denies that he published the words complained of in the statement of claim as alleged or with any defamatory meaning.

(d) The said words are not defamatory of the plaintiff.

(e) In so far as the said words consist of allegations of fact, the said words are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the alleged facts which are matters of public interest.

7. The plaintiff has not been damnified by the alleged acts of the defendants.

8. This defendant, by way of alternative defence as to the whole action, and while denying any liability, joins with his co-defendants in bringing into Court the sum of \$5, and says that that sum is enough to satisfy the plaintiff's claim against all the defendants.

joins with his co-defendants in bringing into Court the sum of \$5, and says that that sum is enough to satisfy the plaintiff's claim against all the defendants."

The plaintiff contends that Rule 307 does not apply to payment into Court in an action for libel published in a newspaper, and that a defendant, by secs. 7, 8, and 9 of the Libel and Slander Act, R.S.O. 1914, ch. 71, is entitled to pay money into Court with his defence only "in a case where he pleads in mitigation of damages that the libel was inserted in a newspaper without actual malice and without gross negligence, and that before the commencement of the action," etc., "he inserted in such newspaper a full apology for the libel," etc.

Section 9 entitles the defendant to pay money into Court with his defence by way of amends for the injury sustained by the publication of any libel to which secs. 7 and 8 apply. Each of those sections applies to an action for libel contained in a newspaper. The present is an action of that kind; and therefore the defendant, as authorised by sec. 9, is entitled, with his defence, to pay money into Court by way of amends.

This motion substantially fails and I therefore direct that the costs be costs in the cause to the defendants in any event of the action.

The order made by MULOCK, C.J.Éx., dismissed the appeal from the Master's order, but directed that particulars should be furnished of the allegation in the 4th paragraph of the defendant Smythe's statement of defence "that the plaintiff was and is not a desirable person for Controller"—the plaintiff being a member of the Board of Control for the City of Toronto.

The plaintiff (by leave) appealed from the order of MULOCK, C.J.Éx.

April 12. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. E. Raney, K.C., for the appellant, argued that para. 4 and para. 6 (a) and (e) of the defence should be struck out: *Moore v. Mitchell* (1886), 11 O.R. 21; *Scott v. Sampson* (1882), 8 Q. B.D. 491; *Zirenberg v. Labouchere*, [1893] 2 Q.B. 183; *Odgers on*

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Libel and Slander, 5th ed., pp. 188, 393; King's Law of Defamation, pp. 552, 732; *Beaton v. Globe Printing Co.* (1894), 16 P. R. 281, at p. 288.

K. F. Mackenzie, for the defendants, respondents, contended that the action was not for libel, but for conspiracy: Halsbury's Laws of England, vol. 27, p. 489. The paragraphs should not be struck out: *Temperton v. Russell* (1893), 9 Times L.R. 319; *Hudson v. Fernyhough* (1889), 61 L.T.R. 722.

April 28. RIDDELL, J.:—On the 15th January, 1916, the plaintiff, a Controller of the City of Toronto, issued a writ against W. F. and H. J. Maclean, A. E. S. Smythe, and the World Newspaper Company of Toronto Limited, endorsed "for damages for libel." On the 4th February, a statement of claim was delivered; statements of defence followed, which may for all purposes of this motion be all considered as in the same terms as that of the defendant Smythe.

The plaintiff applied to the Master in Chambers to strike out the defence and particularly the 4th paragraph and clauses (a) and (e) of the 6th paragraph; the Master refused; and an appeal was taken to the Chief Justice of the Exchequer in Chambers, who dismissed the appeal, directing, however, that particulars should be furnished of the allegation in the 4th paragraph of Smythe's statement of defence "that the plaintiff was and is not a desirable person for Controller." These particulars have been delivered; and, previously, certain particulars were delivered pursuant to demand.

Leave to appeal was given by Mr. Justice Clute—we have not the advantage of my learned brother's reasons for granting leave. The order must, of course, have been made under Rule 507 (2) (b); and it would have been of assistance to have had the reasons why the learned Judge thought that "the appeal would involve matters of such importance that . . . leave to appeal should be given."

The present motion is really to strike out para. 4 and para. 6 (a) and (e) of the defence.

As to para. 4, it is admitted and it is plain that it would not be a proper plea in an action simply of libel—and the defendants contend that this is not an action simply of libel or an action of libel at all.

The plaintiff's counsel agreeing to abandon any claim for conspiracy, the inquiry into what is the cause of action alleged in the statement of claim is academic, except as affecting the costs—it seems necessary to consider the claim in that view.

The tort known as conspiracy is an agreement of two or more persons to do something toward the plaintiff either wrong in itself or by wrong means—before such an agreement becomes actionable damage must be done by some act in pursuance of the agreement. "It is the damage wrongfully done, and not the conspiracy, that is the gist of the action:" *per* Bowen, L.J., in *Mogul Steamship Co. v. McGregor Gow & Co.* (1889), 23 Q.B.D. 598, at p. 616, citing *Skinner v. Gunton* (1669), 1 Wms. Saund. 229, *Hutchins v. Hutchins* (1845), 7 Hill (N.Y.) 104, and Bigelow's *Leading Cases on Torts*, p. 207; see also Selwyn's *N.P.* 1006. It was on this ground that Lord O'Brien, Lord Chief Justice of Ireland, considered that a person who joined a conspiracy after all the damage had been done was not liable—"the conspiracy was, as it were, a machine set going for wrong-doing, and every person who availed himself of its machinery became liable for the damage that subsequently accrued:" *O'Keeffe v. Walsh*, [1903] 2 I.R. 681, at pp. 702, 703.

Our Rule 141 requires the pleading to contain a statement of the material facts upon which the party pleading relies: accordingly in an action for conspiracy it would not be sufficient to allege the wrongful agreement; the acts causing damage must also be alleged.

I confess that, had I been called upon to draft a statement of claim in conspiracy, I should have followed substantially the form here employed—allege the wrongful agreement, the acts done in pursuance of the agreement. I should probably state explicitly, as this claim does implicitly, that damage resulted to the plaintiff from these acts; but I do not see any other change I would have made. The form of the statement of claim is apparently taken from—at all events it is the same as—that of a statement of claim for conspiracy in Bullen and Leake's *Precedents of Pleadings*, 7th ed. (1915), p. 278.

Accordingly I consider that this claim is for conspiracy—and in that view it is not necessary to consider whether it is not also a claim for libel.

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Paragraph 4 in effect states that the agreement, if there was any agreement, was for a rightful purpose, i.e., to prevent the election of an undesirable person to office; but that is no defence to an action of conspiracy. It is well known what is paved with good intentions. What is of importance is, whether the acts to be done were according to law; and this paragraph does not, as it seems to me, raise any such issue. It might indeed be used in minimising damages, but, if it be intended to be a plea to damages, it should so state specifically: *Dryden v. Smith* (1897), 17 P.R. 505; *Fulford v. Wallace* (1901), 1 O.L.R. 278, distinguishing *Beaton v. Intelligencer Printing and Publishing Co.* (1894), 22 A.R. 97.

If it be intended to make the allegations in this paragraph part of the plea of "fair comment" (*Merivale v. Carson* (1887), 20 Q.B.D. 275 (C.A.), and like cases), they should be pleaded properly and specifically in that way.

I think this paragraph cannot stand, and would add that I cannot see how either party can be helped or hurt by either retention or removal. I presume, however, that the time of four appellate Judges must be taken up with trivialities sometimes—"Sufferance is the badge of all our tribe."

As to the second claim on this appeal—if the action is in conspiracy and publications are laid as the overt acts causing damage, it necessarily follows that these publications are charged as being either (1) unlawful in themselves or (2) directed to an end which is unlawful.

The defendant is entitled to plead so as to answer either charge concerning these publications. An answer to the first charge is and must be a contention that the publications are not libellous—accordingly any defence to an action of libel based on these publications will be properly pleadable in an action of conspiracy. Therefore, if the paragraphs complained of could be pleaded in a libel action proper, they are not wrong in a conspiracy action. (I do not say that the converse is true).

As I read 6 (e) it is the ordinary defence of "fair comment"—this has recently been so fully considered in *Augustine Automatic Rotary Engine Co. v. Saturday Night Limited*, 36 O.L.R. 551, that it is unnecessary to go into the matter here at any length. The plea is in the precise form of that in *Peter Walker & Son Limited v.*

Hodgson, [1909] 1 K.B. 239, see pp. 243-247: and, as is said by Vaughan Williams, L.J., on the last cited page: "This form of pleading, which I always think very indefinite and embarrassing has . . . been adopted and sanctioned ever since the decision of Mathew and Grantham, JJ., in *Penrhyn v. "Licensed Victuallers' Mirror"* (1890), 7 Times L.R. 1, and must now be accepted as proper pleading."

Paragraph 6 (a) is, of course, not a defence *per se*, but it contains matter of inducement setting out circumstances which, it is alleged, render comment permissible. In a defence of fair comment, to succeed, the defendant must shew that his criticism deals with such things as invite public attention: Odgers, 4th ed., pp. 186, 187, 194 *sqq.* I can see no objection to this clause.

The plaintiff is entitled to particulars under the plea of fair comment, and, if the particulars be not furnished, he may move: if the particulars are insufficient, there is an appropriate remedy.

This motion is not based upon refusal of particulars; the notice of motion before the Master in Chambers is dated the 28th February; it was served on the 1st March, and the particulars were demanded on the 8th March—what the demand was we do not know, it was not put in, and I shall not look for it.

Much argument was made upon the statements in particulars 2 "b" 2 and 2 "d" 2, that there are "other things in the knowledge of the plaintiff of which the defendant is unable to furnish further particulars at present" or the like; and, in the particulars furnished by order of the Chief Justice of the Exchequer, "The defendant reserves the right to deliver further and other particulars." What harm such assertions do and what good could be done by striking them out I do not know—the assertions do not increase the defendant's rights nor their deletion diminish them. Whether further particulars can be extracted from the plaintiff in examination for discovery we need not determine; and it is time enough to object to any such further particulars when they are tendered.

The ends of justice will be met and the plaintiff get his full rights if we make the order consented to on the argument, that any further particulars are to be furnished within six weeks of the issue of this judgment.

In view of the position taken by counsel for the plaintiff before us, I would order the statement of claim to be amended

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so as to strike out all reference to conspiracy, and make the claim a simple claim in libel.

Objection is made by the defendants that an action of libel cannot be brought now—but that is no answer; this action, as is shewn by the endorsement on the writ, was intended to be an action of libel. While an absolutely different and distinct cause of action from that mentioned in the endorsement on the writ may not be set up in the statement of claim—*United Telephone Co. Limited v. Tasker* (1888), 59 L.T.R. 852, and *Cave v. Crew* (1893), 68 L.T.R. 254, etc.—there is no reason why the very cause of action mentioned in the endorsement may not be set up at any time. This is a much stronger case than *Bugbee v. Clergue* (1900), 27 A.R. 96; *S.C., sub nom. Clergue v. Humphrey* (1900), 31 S.C.R. 66.

I confess to great sympathy with a solicitor called upon to draw a statement of defence in a libel action—in the general *debâcle* of pleadings, this remains an action in which it is not safe to treat pleadings as a mere exercise in English composition for the junior articulated clerk and the typist; there is still some art in libel pleadings.

I can understand, too, the statement of Mr. Mackenzie that he was “embarrassed” in determining precisely what the claim was—the action for conspiracy is rare in our Courts (this is the first I have seen).

I would allow the defendants to amend their defence as they may be advised, knowing now, as they will, that the action is for libel and libel only.

And I would give no costs of this appeal.

LENNOX, J., concurred.

MASTEN, J., agreed in the result.

MEREDITH, C.J.C.P.:—This is another of those appeals, of quite too frequent occurrence, in which matters of practice only are involved: matters which as a rule should be dealt with in the High Court Division in such a manner that no substantial prejudice to any party could arise; and usually are so dealt with.

The action is one for libel, and so, having regard to the law and practice particularly applicable to it, as well as by reason of

its very nature, one over which the solicitors and parties concerned are naturally apt to be more than ordinarily anxious: but in most of the cases coming here I cannot but think that the party complaining is generally really more frightened than hurt.

Take this case for an instance: the defendants were ordered to give particulars in regard to some parts of their statements of defence; and have done so, took unto themselves, in words, a right to add to such particulars; but it ought to be needless to say that no effect follows such an extension of the time, which was fixed by the order of the Court, within which all their particulars should be given; and that the particulars given could not, after the lapse of the time limited by the order, be added to except by leave of the Court.

Strictly dealt with, the plaintiff was entitled to have that reservation as well as the reference to the records of the Board of Health stricken out; but, if, in truth, the defendants need further time for giving particulars, as the trial is not to be had until the autumn, there is no good reason why a month's or six weeks' further time should not be given to them; that cannot harm any one, and will prevent any feeling that any one has been unduly hurried in the conduct of the defence or prosecution of the case.

But I desire to add, so that the defendants may be under no misapprehension as to the purpose of giving further time, that it is not given to enable them in any way to seek new facts upon which to base their defence of fair comment, for fair comment can be fairly supported only upon the facts upon which the commentator wrote: time may be needed to verify them or learn whether they really did exist, for if not they cannot justify the comment or tend to do so; and I see no reason why the plaintiff should not be examined for that purpose; but I think the particulars should be first given; that is the best way of preventing, to some extent, unfair means of supporting a defence of fair comment. In this case the plaintiff was reasonably safe, because the particulars given could not be added to without the leave of the Court; and, before leave is given, care should be taken that nothing is unfairly added; that the defendants give sufficient reasons for not having already given them.

In some of cases coming before us, the parties seem to be oblivious to the fact that their cases must come before a trial

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Judge whose duty it is to take care that no inadmissible evidence is admitted, that the true issues only shall be tried, and that justice shall be done in all things; and so irregularities, or inadmissible questions on examination for discovery, ought generally to be things of no great moment; certainly not enough to justify running off to this Court about them always: though there may be cases in which it may be necessary or advisable to come here before trial; for an instance only, upon a question involving the whole conduct of the action or involving it very substantially; so that time and money would be saved by having the point determined before trial, instead of on an appeal after trial, when that appeal might lead to a new trial.

It must not be forgotten that a defence of fair comment is not a defence of justification; although, to support it, all the defamatory facts alleged in the comment must be justified, and must be sufficient to make, in the circumstances of the case, the comment "fair."

I cannot take very seriously Mr. Mackenzie's contention that this is not an action of libel, but is solely one of conspiracy; for, in the first place, what difference does it make so far as this appeal goes? Call it what you please, the 4th paragraph of the statement of defence discloses no defence to it, and at the least is useless, just as is perhaps the use of the word "conspiracy" in the statement of claim. It is much to be regretted that pleaders do not adhere to the simple and well understood forms of stating claims and defences. It ought to have been enough for the plaintiff to have alleged that the defendants jointly, and each separately, published the libel alleged; and for the defendants to have said "not guilty" and "fair comment" in the usual way. Nothing that could be given in evidence, as the pleadings stand, could have been excluded under the usual form of pleading; and I had really thought that the fashion of a few years ago, of, when in doubt, or when unable to imagine any other offence, charging or alleging conspiracy, had departed.

But why "conspiracy" only; why not libel? If the libel be not proved, what becomes of the conspiracy? It could not be contended that any kind of a civil action remained. Take away the word "conspiracy," and the action remains as it is one of libel. If joint liability is proved, then a conspiracy, that is an

agreement, between the defendants, is proved: and, if the defendants were merely alleged to have published the libel, evidence of all the circumstances under which it was published, whether inadvertently, or in pursuance of a scheme to defame the plaintiff so as to defeat his efforts to obtain a seat in a municipal council, might all be given in evidence.

And, if this is not libel, one has only to insert the word "conspiracy" in a libel action in order to get rid of all the effects of the Libel and Slander Act, including security for costs, as well as all else the special provisions of the law regarding actions for defamation of this character, including compulsory trial by jury, unless the parties otherwise agree.

The 4th paragraph of the defence and the 5th, which is dependent on it, should be struck out; as also the clauses in the particulars objected to; the parties should have leave to amend their pleadings as advised, the plaintiff within two weeks, the defendants within two weeks thereafter; and the defendants should have six weeks within which to amend their particulars as advised. No order as to costs of this needless appeal.

Order below varied.

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Vendor and Purchaser—Agreement for Sale of Land—Breach by Purchaser—Resale by Vendor with Assent of Purchaser—Damages—Deficiency on Resale—Expenses of Resale—Interest and other Charges.

The defendant refused to carry out an agreement for the purchase of a house and land from the plaintiff; the plaintiff resold at a lower price; the difference in price was compensated by the plaintiff retaining a sum paid by the defendant as a deposit; but the plaintiff claimed, in addition, a sum made up of agents' commission upon and expenses of the resale and interest, etc.:—

Held, by CLUTE, J., at the trial, that the plaintiff was entitled to recover such damages as would arise naturally from the defendant's breach of contract, and that included the difference in price, the expenses of resale, and a proper allowance for interest, insurance, and a proportion of the municipal taxes charged upon the property.

Held, by a Divisional Court, upon appeal, that the resale was made with the defendant's assent and upon his account, upon an agreement that the rights of the parties to the first sale should be adjusted on the basis of the first agreement; and the damages awarded by the trial Judge were just the sum coming to the plaintiff upon such an adjustment. As the plaintiff cleared

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the property of tenants and held it ready for the defendant from the day he was to have had possession until the second sale, the vendor was entitled to interest for non-payment of the purchase-money over and above the amount of the mortgages.
The judgment of CLUTE, J., was affirmed.

ACTION by a vendor of land and other property (plaintiff) against the purchaser (defendant) to recover the amount of the plaintiff's loss by reason of the defendant having declined to complete his purchase. The sale to the defendant was for \$30,000. The defendant paid \$2,000 to the plaintiff as a deposit. The plaintiff resold for \$28,000, and, giving credit for the \$2,000, claimed \$1,497.03 as the amount of his loss, made up of interest, commission, and expenses.

The action was tried by CLUTE, J., without a jury, at Toronto.
W. N. Tilley, K.C., for the plaintiff.
G. H. Sedgewick, for the defendant.

March 1. CLUTE, J.:—Action to recover \$1,497.03, balance due upon a resale of certain property sold by the plaintiff to the defendant for \$30,000, and which the defendant, having paid \$2,000 deposit, refused to take; and the property was thereupon resold at \$28,000. The agreement is in the form of an offer by the defendant, dated the 4th June, 1915, to purchase the premises on the north side of Binscarth road, Toronto, street number 70, including the household furniture, for \$30,000, \$2,000 in cash, \$12,800 on the 15th July, 1915, and the balance of \$15,200 by assuming a mortgage thereon. The offer further states that the title is to be good and free from incumbrance, except local improvement rates and the restrictions that run with the land.

This offer was accepted by the plaintiff on the 5th June. The plaintiff was ready to complete the sale on the 15th July, but the defendant was not ready, and asked further time, which was extended from time to time until the following September, when the defendant finally refused to carry out the purchase, alleging at the time that his wife was not pleased with the house. He now complains that there are restrictions on the lot which prevent the erection of an apartment house, and he further alleges that he was told that if the title was not good there would be no sale, and he relies upon these restrictions as shewing that the title was not what he bargained for.

I find as a fact that the defendant was expressly informed that there were restrictions and that they were of a beneficial kind, namely, to prevent the property in that neighbourhood from being built upon for manufactories or apartment houses, etc., and that he made no objection, but recognised the restrictions as favourable to the property for residential purposes. The restriction in question is imposed by a city by-law. I find that there was no objection to the title; and, had the plaintiff seen fit, he was entitled to enforce specific performance of the agreement. The plaintiff, however, after informing the defendant, took proceedings to resell the property, which he did for \$28,000. This resulted in a loss, as claimed by the plaintiff, after giving credit for the \$2,000, of \$1,497.03.

The defendant now takes the position, in addition to the above objections as to restrictions, that the plaintiff cancelled the contract and sold the property as his own, and that, while he is entitled to retain the \$2,000 deposit, he is not entitled to claim under the contract, which was put an end to by his own rescission, and he relies upon a statement of the law as laid down in Halsbury's Laws of England, vol. 25, pp. 397, 398, para. 680, where it is said that if the vendor, acting within his rights, rescinds the contract, he may resell the property as owner and retain any excess of price obtained on such resale beyond that fixed by the contract; but he cannot recover damages, nor, if the purchaser has been in possession, occupation rent.

I find that the contract was not in fact rescinded; that the plaintiff did not sell the premises as his own; but that, having a lien upon the property for the unpaid purchase-money, he sold the same, realising what he could out of the property; and, not having realised sufficient after applying the \$2,000 to reimburse him for the defendant's breach of contract in not carrying out the sale, he had a right to sue the defendant for such breach of contract and to recover such damages as would arise naturally from the breach. This principle is applicable in the case of a sale of land where the contract is broken by the purchaser: Halsbury's Laws of England, vol. 25, p. 409, para. 703; *Laird v. Pim* (1841), 7 M. & W. 474.

On a resale at a lower price, he can recover the difference in price and the expenses of the resale: *Noble v. Edwardes* (1877).

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5 Ch.D. 378, where Bacon, V.-C., held that the vendor had a right to resell the estate and claim the difference by way of damages, there being no distinction in this respect between a sale of chattels and of land. This decision has been recognised as good law in the text-books: Dart on Vendors and Purchasers, 6th ed., p. 185; 7th ed., p. 179. In the last edition of Dart reference is made to an article in 43 Solicitors' Journal, p. 601, where doubt is thrown upon the right of a vendor to resell in such a case. Closing the article, the learned writer says (p. 602): "If resale by a vendor of lands on the purchaser's default be unlawful without the authority of the Court, it is questionable whether the vendor would be entitled to recoup himself the expenses of resale out of the proceeds thereof."

The *Noble* case has not, so far as I am aware, been overruled. It commends itself to me as sound in principle, and I think I am bound by it. See also Davidson's Precedents, 4th ed., vol. 1, pp. 568-570; 5th ed., p. 476.

There is, in addition to the naked right of the plaintiff, strong evidence of acquiescence on the part of the defendant, but I prefer to rest my decision upon the ground first indicated.

A further objection was made that the property was not sufficiently advertised on the resale. Having regard to the fact that the property was in the market for over a year prior to the sale to the defendant and was fully advertised, I think the plaintiff pursued the proper course in again placing the property in the hands of the same agents who formerly sold it. They had already advertised the place very fully and were in touch with possible purchasers; and, it being proven that they were competent and reliable agents, it was reasonable to leave the course to be pursued to them; and I find that they pursued a reasonable course in the resale. The defendant in fact blamed the agents for putting so high a price upon it, \$30,000, as they might not be able to get a purchaser at that price; a sale at \$28,000, having regard to the depression and the fact that property was almost unsaleable, was a reasonable and fair price, and I do not think the plaintiff would have been justified in refusing, through his agents, this offer. I fully accept the evidence given by the agents, Robins & Burden, as against that of the defendant, and I think the course pursued by these agents is supported by the evidence of Mr.

Smith, a witness produced by the defendant, and I find that the sale was sufficiently advertised, properly conducted, and a reasonable price obtained.

But it is said that in any event the plaintiff is not entitled to recover more than \$700, being the amount of the commission; that all charges for interest and insurance and the proportion of municipal taxes should be disallowed. I am not of this opinion. There having been a breach of the contract, the plaintiff is entitled to be placed as nearly as may be in the position in which he would have been had there been no breach. Had the agreement been carried out on the 15th July, the interest upon the mortgages against the property would have been borne by the purchaser, or rather, paid out of the purchase-money or assumed by the purchaser, and so of the insurance and proportion of the taxes. It was agreed that the solicitor's fees should be agreed to and fixed at \$75, and it was further agreed that, if the plaintiff was entitled to recover for interest and insurance charges, the amounts charged were correct.

I find that he is so entitled to recover, and judgment should therefore be entered for the plaintiff for \$1,497.03.

The plaintiff is entitled to the costs of the action.

The defendant appealed from the judgment of CLUTE, J.

April 25. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. H. Sedgewick, for the appellant, argued that interest on the purchase-price should not be allowed: *Mayne on Damages*, 8th ed., p. 246. The plaintiff was not entitled to claim under the contract, which was put an end to by his own rescission: *Halsbury's Laws of England*, vol. 25, pp. 397, 398; *Noble v. Edwardes*, 5 Ch.D. 378; *Williams on Vendor and Purchaser*, 2nd ed., p. 51; article in 43 *Solicitors' Journal*, p. 601; *Howe v. Smith* (1884), 27 Ch.D. 89; *Henty v. Schröder* (1879), 12 Ch.D. 666.

W. N. Tilley, K.C., for the plaintiff, respondent, contended that there had been no rescission by the plaintiff, but a new agreement, under which the resale took place; and that the plaintiff was entitled to interest as part of his loss or damage, in the circumstances shewn in evidence.

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April 28. The judgment of the Court was delivered by MEREDITH, C.J.C.P.:—It is not necessary to consider in this case the broad question of the remedies of a seller of land against his purchaser, who breaks his contract to purchase; because the parties themselves came to an agreement respecting them when it was made plain that the purchaser could not pay the price of, and take, his purchase; and that agreement in effect was that the land should be sold again by the seller, but on the purchaser's account, and that, after the completion of that sale, the rights of the parties, to the first sale, should be adjusted on the basis of the first agreement, that is, as if that sale had been completed and the second sale had been made by the first, to the second, purchaser.

The second sale was made accordingly, with the first purchaser's assent—indeed, it is said, at his request; and the damages which have been awarded to the plaintiff are just the sum coming to the plaintiff upon such an adjustment as was so agreed upon, though not computed by the trial Judge just upon such a basis.

The only item about which there could be any reasonable controversy, in any case, is the interest allowed for non-payment of the purchase-money over and above the amount of the mortgages; but, as the seller cleared the property sold of tenants and held it ready for the purchaser from the day he was to have had possession until the second sale, the vendor is entitled to such interest: in that item and in the other items comprised in the damages awarded, the plaintiff gets no more nor any less than would have been his if the first agreement had been carried out; and that was, as I have said, the intention of the parties in all that was done between the abortive and the concluded sales.

Appeal dismissed with costs.

[MIDDLETON, J.]

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April 29.

UNITED STATES PLAYING CARD CO. v. HURST.

Trade Mark—Infringement—Colourable Imitation—Trade Name—Intent to Deceive—Passing off—Evidence—Actual Case not Proved—Laches and Acquiescence—Abandonment—Long User by Others—Fraud—Injunction—Damages.

In an action to restrain the defendant from infringing trade marks claimed by the plaintiff company with respect to playing cards, consisting of the word "Bicycle" and of three designs, it appeared that the registration took place in 1906, but that the marks had been in use many years previously:—*Held*, upon the evidence, that the defendant and an English firm, who manufactured playing cards, conspired to defraud the plaintiff company of its trade name and of the profits legitimately its, as the result of its advertising and enterprise.

The trade mark existed independently of any registration; and the plaintiff company was entitled to succeed, not only by virtue of the trade mark, but because a plain case of passing off had been made out.

No witness was called who had been deceived; but where the intention to pass off is abundantly proved, and the goods are put up in such an imitative form as to make the passing off easy, it is not essential that an actual case of passing off should be proved.

The plaintiff company had not, by acquiescence and laches, abandoned its trade marks, nor had they become *publici juris*. Long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction; and here there was no sufficient evidence of acquiescence to constitute an abandonment.

Ford v. Foster (1872), L.R. 7 Ch. 611, and *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275, referred to.

An injunction and damages were awarded to the plaintiff company.

ACTION to restrain the defendant from infringing certain trade marks of the plaintiff company for playing cards.

April 25, 26, and 27. The action was tried by MIDDLETON, J., without a jury, at Toronto.

D. L. McCarthy, K.C., and Britton Osler, for the plaintiff company.

F. B. Fetherstonhaugh, K.C., and A. C. Heighington, for the defendant.

April 29. MIDDLETON, J.:—The action is brought to restrain certain alleged infringements by the defendant of the trade marks claimed by the plaintiff company with respect to playing cards. These trade marks consist, first, of the word "Bicycle" as applied to playing cards; secondly, of three designs, separately recorded as trade marks. The first of these designs is a picture of a safety bicycle; the second, some elaborate scroll work with four circular

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panels or fields, one near each corner of the card, each containing a figure riding upon a bicycle, this design being known as "The Expert;" the third, a representation of acorns and oak leaves surrounded by a border composed of bicycles and bicycle wheels. These four trade marks are all registered, and the registration has never been in any way impeached. The registration took place on the 3rd August, 1906, but the marks had been in use many years previously.

The plaintiff company is a very large concern, monopolising most of the playing card business in the United States. It has carried on business there for many years, and has exported its products to Canada and other countries.

Messrs. Warwick Brothers and Rutter, wholesale stationers, Toronto, as a branch of their stationery business, sold playing cards, and among other cards they dealt in were those made by the plaintiff company. The cards were imported by them at any rate from the year 1887 on.

The defendant was a traveller in the employ of Warwick Brothers and Rutter for six or seven years, ending in 1902, and was recognised as an expert in connection with the sale of cards. The plaintiff company's cards were not the only ones in which Warwick Brothers and Rutter dealt; they also imported cards from Messrs. Goodall & Co., the largest English manufacturers of playing cards; and the defendant in this way became not only familiar with the market but well posted in its requirements and the adaptability of the goods of the plaintiff company and of the English firm to these requirements.

The plaintiff company had manufactured for many years a grade of playing cards which had been placed upon the market under the trade name "Bicycle Cards." These cards were first manufactured in July, 1885. It was thought that a good market would be found for cards which could be sold at 25 cents a pack retail, if they were manufactured of thin card, superior in quality to anything then upon the market, and the name "Bicycle" was chosen as the trade name to designate this new card. Very large sums of money were spent in advertising it and a high grade card, retailing at 50 cents, then placed upon the market under the name "Congress." The amount spent in advertising these two brands ran as high as \$150,000 in one year. This expensive ad-

vertising and the fact that the cards were superior to anything on the market at similar prices had its legitimate result, and a very large trade was done throughout the United States and to some extent throughout Canada. Bicycle cards were not made of one uniform design, but different designs were adopted to appeal to the popular fancy. At first there were only four or five different designs, but new designs were from time to time adopted, and, if they turned out to be good sellers, they persisted; if not, they were abandoned. The "Expert" design was one of the original designs, and is still very popular. The acorn design was adopted in 1888, and is reckoned a good seller.

In 1902, Mr. Hurst, who, as I have said, was thoroughly familiar with the situation, resigned his position with Warwick Brothers and Rutter, a course he had contemplated for some few years, and become connected with the Goodall firm. He went to England to complete his arrangement with the firm, and has acted as their Canadian representative ever since. When he went to England, he took with him samples of cards manufactured by the plaintiff company, and he has since gone to England at least once a year, taking with him samples of the plaintiff company's cards.

Almost immediately, Goodall & Co. adopted designs manifestly copied from the plaintiff company's. In some instances, there has been a colourable difference in the details of the design; e.g., in the "Expert" the bicycle faces a different way, and the bicycle, instead of being of the old style, is made a "safety," and a woman is substituted for a man. But, as the field containing the figures is only half an inch across, this is a detail and not noticeable unless the backs of the cards are carefully scrutinised. In the acorn design there was no difference whatever.

It is not only in these two designs that there has been plainly copying, with colourable variations. In a series of designs, covering a dozen or so, the copying is plainly evident.

These cards were then put up in "tuck" cases, in which the word "Bicycle" was made a prominent feature, and the cases closely resembled in general appearance the tuck cases used by the plaintiff company to contain its packs. These tuck cases were sold to the trade packed in cartons containing one dozen, and the cartons were marked in a way well calculated to deceive.

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Goodall & Co. advertised these cards through Mr. Hurst in a way which is suggestive. The advertisements they published were not advertisements which would reach the general card-using public, but were confined to a trade journal which would reach dealers; and in this, as shewn by the sample advertisement produced, "Bicycle" is made a conspicuous feature. They also sold cards to the trade at a lower price than the plaintiff company's card, and in this way sought to avail themselves of the expensive advertising utilised to create a market, and afforded to the dealers an opportunity of obtaining greater profit by substituting the English for the American card.

The proper inference from all the evidence is, that Hurst and the Goodalls conspired together to defraud the plaintiff company of its trade name and of the profits legitimately its, as the result of its advertising and enterprise.

In 1905, some knowledge of the defendant's practices came to the plaintiff company, and apparently a suit was threatened, but it was not prosecuted. Mr. Hurst says that he then modified the form of the "Acorn" design which he used, and also the "Expert" design, and abandoned the use of the word "Bicycle" on the tuck cases, although he retained it on the cartons. It is very significant that more than a year after this—in September, 1906—he is found advertising "Bicycle" cards in the trade journal; this advertisement, according to Mr. Hurst himself, being one that was changed from month to month by him, so that the advertising could not have been a mere slip or oversight by not changing the advertisement ordered at an earlier date.

The changes then made in the two designs are, to my mind, clearly indicative of an attempt to depart from the plaintiff company's design only so far as was absolutely necessary to evade, as it was hoped, an infringement of the trade mark. In this attempt, I think, there has been entire failure, and the altered "Expert" and "Acorn" designs are still objectionable, as being colourable imitations of the plaintiff company's designs.

As usual in cases of this kind, numerous defences have been argued, but I do not think that any of them has been made out. Under our law, the trade mark existed independently of any registration; and here, I think, the plaintiff company is entitled to succeed, not only by virtue of the trade mark, but because, as I think,

a plain case of passing off has been made out. It is true that no witness was called who had been deceived. In some cases this may be a matter of great importance; but where the intention to pass off is abundantly proved, and the goods are put up in such an imitative form as to make the passing off easy, I do not think it is by any means essential that an actual case of passing off should be proved.

Then it is said that the plaintiff company has, by acquiescence and laches, abandoned its trade marks, and that the marks have now become *publici juris*, not only because of the defendant's user, but because of the manufacture of cards which might be deemed an infringement, by two Montreal manufacturers. One of these makes and sells "Cyclist" cards. These cards are not put up so as to deceive the public, and I do not regard the "Cyclist" card as an infringement. The other card relied upon is one labelled "Sports," which again I do not regard as in any way an infringement. It has on the back a boy upon a bicycle, but there is no suggestion of imitation of the plaintiff company's design.

Another firm manufactured a card called the "Bicyclette," which was probably intended as an imitation of the "Bicycle" card, and may well have been put out fraudulently. The name of the manufacturer does not appear upon the card, but initials appear, which, it is said, are the initials of a local firm in Montreal, at whose instance it was got out for use in their trade. It is not shewn that the plaintiff company knew of this card.

This same firm manufactured another card called the "Senator," which I think it is quite likely was intended to be an imitation of the plaintiff company's card. Again, the manufacturer's name is suppressed and the name of a non-existent firm—"Kaiser and Lehman, London"—was substituted, for the purpose of concealing and misleading. Knowledge of the existence of this card was also not brought home to the plaintiff company.

Another matter which is much relied upon is the fact that it is said that Goodall & Co. had, long prior to their employment of the defendant, themselves used the word "Bicycle" in connection with playing cards. The facts appear to be that Goodall & Co. manufacture an enormous number of different designs of cards. These are arranged in series, having descriptive names indicating the quality and character of the card, in the same way that the

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word "Bicycle" indicates the character and quality of the plaintiff company's series of cards. Each of these series has a descriptive name, one being "Viceroy"—a series of cards supposed to be adapted for use in India. Among the different designs of "Viceroy" cards was one in which a bicycle was used, and this was called the "Bicycle" series. The "Viceroy" cards are not marketed in Canada. Most of the cards sent to the Canadian market belong to the series designated as "Imperial Club," possibly because "Imperial Club" was a trade mark already well known here; but, immediately following Mr. Hurst's first visit, the "Bicycle" design was transferred from the "Viceroy" to the "Imperial Club" series. This design, as might be expected from its independent origin, did not in any way resemble the plaintiff company's productions.

This limited use of the word "Bicycle" appears to me to be quite insufficient to prevent the plaintiff company from acquiring an exclusive trade mark for its "Bicycle" series.

I am content to accept the law as laid down by The Hon. H. Fletcher Moulton in the article on Trade Marks, Halsbury's Laws of England, vol. 27, p. 774, para. 1356: "Long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction."

But I think that here there clearly has been no sufficient evidence of any acquiescence in the user by the defendant or Messrs. Goodall & Co. to constitute an abandonment.

In 1905, apparently, an action was threatened, exactly what for is not made plain; but the defendant himself says that the action was not prosecuted because of his assurances; and his further conduct has not been shewn to have come to the knowledge of the plaintiff company before the bringing of this action.

In *Ford v. Foster* (1872), L.R. 7 Ch. 611, the test is clearly stated by Sir G. Mellish, L.J., at p. 628: "I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me,

however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone." Lord Justice James thus deals with the argument that the thief acquires a right by continual thieving, saying (p. 625): "It has been said that one murder makes a villain and millions a hero; but I think it would hardly do to act on that principle in such matters as this, and to say that the extent of a man's piratical invasions of his neighbour's rights is to convert his piracy into a lawful trade."

National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co., [1894] A.C. 275, shews that, where the trade mark has become *publici juris*, mere fraud on the part of the defendant is not enough to entitle the plaintiff to an injunction; but that cannot help the defendant here; for, in my view, the trade marks never became in any sense *publici juris*, within the meaning of that term as explained by Sir George Mellish.

I therefore award the plaintiff company an injunction against the infringement of its trade marks, including the use of the word "Bicycle;" but I think that there should be excepted from this injunction the use of the pictures of bicycles found on the "Viceroy" card, for I do not regard this as constituting an infringement of the plaintiff company's rights.

The defendant should pay the costs of the action, and damages, which I fix at \$250, subject to the right of either party, at its own risk as to costs, to have a reference, and subject to the right of the plaintiff company, at its own risk as to costs, to have an inquiry as to profits.

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[APPELLATE DIVISION.]

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Lunatic—Order Declaring Lunacy and Appointing Committee—Discharge from Asylum—Order not Superseded—Moneys Paid out of Lunatic's Estate by Committee upon Lunatic's Order—Gifts—Invalidity—Evidence—Investigation as to Mental Capacity—Lunacy Act, secs. 3, 6, 7, 10—Liability of Estate of Committee to Account—Indemnity from Donees—Following Moneys into Lands Purchased—Lien—Realisation.

In 1908, an order was made by a Judge declaring R. a lunatic and appointing a committee of his estate. He was at that time confined in an asylum for the insane, from which he was discharged in 1910. In 1911, the committee, upon written orders signed by R., gave considerable sums of money, out of R.'s estate, to his nephew and niece, who each purchased land with the money so given and each took a conveyance in his and her own name. The order declaring lunacy had not then been and was not afterwards reversed or superseded. After the death of R. and the death of the committee, this action was brought by R.'s executors, against the executrix of the committee and the nephew and niece, to recover the money so given:—*Held*, that the plaintiffs were entitled to recover; for R., while the order declaring him a lunatic remained unrevoked and in force and the committee undischarged, was incapable of so dealing with his estate; and, apart from the order, R. was, when the gifts were made, upon the evidence taken at the trial, of unsound mind.

Sections 3, 6, 7, and 10 of the Lunacy Act, R.S.O. 1914, ch. 68 considered.

In re Walker, [1905] 1 Ch. 160, followed.

Semble, per GARROW, J.A., that the plaintiffs were entitled to follow the moneys into the lands purchased, and to a lien thereon and realisation by sale.

And *held*, per *Curiam*, that the defendant the executrix of the committee was entitled to indemnity from her co-defendants, but not to a lien upon the lands purchased.

Per HODGINS, J.A.:—Inquiry into R.'s mental capacity, while the order declaring him a lunatic stood, was incompetent, and the investigation which took place at the trial should not have been entered upon.

Judgment of LENNOX, J., varied.

ACTION by Michael Rourke and Ignatius Halford, executors of the will of James Rourke, deceased, against Christine Halford, sole executrix of the will of Dennis M. Rourke, deceased, and James Raymond Rourke and Mary McBride, for an account of moneys of the estate of James Rourke said to have been improperly handed over by Dennis M. Rourke, as committee of the estate of James Rourke (a lunatic), to the defendants James Raymond Rourke and Mary McBride, the son and daughter of Dennis.

The action was tried by LENNOX, J., without a jury, at Sandwich.

F. D. Davis, for the plaintiffs.

M. K. Cowan, K.C., and *E. A. Cleary*, for the defendants
Rourke and McBride.

J. H. Rodd, for the defendant Christine Halford.

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January 8. LENNOX, J.:—By an order of this Court made on the 16th June, 1908, James Rourke was declared to be a person of unsound mind and a lunatic; and, in pursuance of this order, his brother, Dennis M. Rourke, who died on the 4th July, 1913, was appointed committee of his person and estate. The action is to compel the estate of the committee to account for moneys of the estate of James Rourke said to have been improperly handed over by the committee to his son and daughter, and some small sums to the House of Providence at London, in pursuance of orders in writing signed by James Rourke, at a time when, it is alleged, he was not capable of making a gift or dealing with or disposing of his estate or effects.

The objection to the gifts or alleged gifts to the House of Providence was abandoned at the trial, and for the purposes of this action I am to treat them as valid, or at all events as not in question.

Concerning the other two alleged gifts—both made in 1912—the twofold ground upon which the plaintiffs object is, that the deceased James Rourke was not at the time, as a matter of fact, mentally capable of making a valid disposal of property, and that, at all events, even if he was, at the dates in question, in fact of sound and disposing mind and capable of understanding, and did in fact understand, what he was doing, he was not then legally qualified to deal with or capable of dealing with his property or effects, unless and until the order of the Court referred to was superseded, annulled, or set aside.

After the making of the order and declaration of lunacy referred to, on the 16th June, 1908, there was no order or proceeding of the Court superseding, rescinding, or vacating it. The committee directly procured the gift to his son; he prompted his daughter to apply for the gift to her; he concurred in both; and he paid the money in both cases out of the money he held as committee and trustee. He has not accounted to the Court for these moneys, nor, finally, for the moneys generally which

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came to his hands as committee; and he was not relieved from office or discharged by any order of the Court.

In the absence of anything causing doubt or suspicion, sanity and capacity, it is generally said, are to be presumed; although the proposition is very haltingly assented to, in the case of a gift by will at all events, in the much considered case of *Sutton v. Sadler* (1857), 3 C.B.N.S. 87. But it is sufficient for the purposes of this case to say that it is clear that, once a testator or donor is shewn to have been incompetent at any time, the onus of proving recovery or a lucid interval is cast upon the person seeking to uphold a subsequent gift or bequest. As was said by Sir John Nicholl in *Groom v. Thomas* (1829), 2 Hagg. Eccl. 433, 434: "Every person is presumed to be sane until it is shewn that he has become insane: the presumption then changes: it is presumed that he *continues* of unsound mind; and the party setting up any instrument executed after insanity has manifested itself, has the burthen of proof cast upon him: he must shew recovery." This doctrine has not been questioned, and is not, I think, disputed by counsel for the defendants.

At the time the declaration of lunacy was made and the committee appointed, on the 16th June, 1908, James Rourke was an inmate of the Hospital for the Insane, London. He was discharged by an order of the Inspector of Prisons and Public Charities on the 1st March, 1910, and thereafter, until his death, on the 11th December, 1913, resided in the House of Providence in that city. He was then upwards of eighty years of age.

It is perhaps manifest in any case, but it is at all events clear upon the evidence of Dr. Robinson, that nothing is involved in the certificate of the Inspector beyond the question of whether it was safe to allow the patient to reside outside the limits of the Hospital for the Insane—whether or not he was likely to cause injury to himself or others.

The gifts in question were made after the order of the Inspector—some two years or more afterwards, I think.

The proceedings leading to the declaration of lunacy were put in, subject to objection, I understand; but I have not found it necessary to read them; and whether they constitute evidence or not I need not consider, as I take the order and the admitted lunacy as the starting-point—this with the affidavit of Dr. Robinson, for he was called by the defence and cross-examined upon it.

A declaration of lunacy is made by the Court, without the intervention of a jury, only when the evidence establishes lunacy beyond reasonable doubt; and, whether a jury intervenes or not, is subject to appeal. In default of appeal, or if the appeal fails, the declaration is final unless or until it is superseded, vacated, or set aside: the Lunacy Act, R.S.O. 1914, ch. 68, secs. 6 and 10. I refer to this not as determining the status of the defendants—their right to shew recovery or a lucid interval and capacity as a matter of fact—but as indicating what the defendants have to establish, treating the question of recovery simply as a matter of fact.

There was the evidence of a good many persons to the effect that in their casual intercourse with him they detected nothing to indicate that James Rourke was not mentally normal. But in 1908 he was an old man, suffering from senile dementia, and Dr. Robinson, who had observed him from the 1st January, 1908, and examined his previous asylum records, and then made a careful examination, thought there was no likelihood of recovery; and neither he nor Dr. Mugan would venture the opinion that Rourke was ever actually of sound mind after the date of the order of lunacy. Dr. Robinson upon cross-examination concurred in all that he said in his affidavit of the 23rd May, 1908. In that he said: "In my opinion, the said James Rourke is suffering from senile dementia, and, as I understand, is about seventy-five years of age, and appears to me to be of that age. I do not consider he has any chance of recovering his mental soundness." Rourke was about seventy-nine when he purported to make the alleged gifts.

There was no evidence to satisfy me that as a matter of fact James Rourke was of sound mind or capable of dealing with his property or moneys at the time of the alleged gifts or either of them, or at any time subsequent to June, 1908. The defendants have failed to prove recovery in the legal sense, though it is possible that his condition improved in some respects.

Having come to this conclusion of fact, it is not necessary for me to consider the other objections taken by the plaintiffs. In this connection, reference may be had to *In re Walker*, [1905] 1 Ch. 160; *Re Robinson* (1910), 1 O.W.N. 893; *In re Dyce Sombre* (1844), 13 L.J. Ch. 335; *Ex p. Stanley* (1750), 2 Ves. Sr. 25; *In re*

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Blackmore (1863), 32 L.J. Ch. 436; *Martin v. Johnston* (1858), 1 F. & F. 122; *Ferguson v. Borrett* (1859), 1 F. & F. 613; *Ex p. Wright* (1683), 1 Vern. 155; and *Hall v. Warren* (1804), 9 Ves. 605, 610.

Nor is it necessary to consider a question which was not raised: the absence of independent professional assistance, coupled with the fact that there was in effect a transfer of property by the committee contrary to the duties imposed upon him by the Court, and by a person who, independently of this, as alleged in the statements of defence, stood in a fiduciary relation to the donor, and that the gifts were to the children of this person—in substance to himself.

I regret that I have to find against these gifts, as the donor, having regard to the extent of his estate, could well make them, and was favourably disposed towards the donees. As I am of opinion that there was no actual bad faith on the part of either the committee or his son or daughter, I will not compel the defendants to pay costs.

There was no evidence specially directed to the status of the defendants James Raymond Rourke and Mary McBride, who were served with third party notices; but all that they set up by their defence was inquired into, and is disposed of upon the main issue, as I determine it.

There will be judgment declaring that the alleged gifts to these defendants were and are null and void, and that the estate of Dennis M. Rourke is not entitled to credit and is accountable for these moneys to the plaintiffs.

I do not feel compelled to saddle any of the defendants with costs. The plaintiffs will have costs out of the estate of James Rourke, upon the basis of solicitor and client. Whether Christine Halford should have costs out of the estate she represents, can best be determined when she passes her accounts.

The defendants appealed from the judgment of LENNOX, J.

April 17 and 18. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

M. K. Cowan, K.C., for the defendants J. R. Rourke and Mary McBride, appellants, argued that *In re Walker*, [1905], 1 Ch. 160, was distinguishable. He also referred to *Re Norris* and

Re Drope (1902), 5 O.L.R. 99; *Ferguson v. Borrett*, 1 F. & F. 613. The sanity of James Rourke when the gifts were made was proved by the evidence of persons who had him under continual observation.

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J. H. Rodd, for the defendant Christine Halford, appellant, argued that she should be indemnified by her co-defendants in case judgment should be given in favour of the plaintiffs, as the co-defendants were aware of all the facts. He referred to *Beverley's Case* (1603), 2 Coke 568.

F. D. Davis, for the plaintiffs, respondents, contended that the judgment of the learned trial Judge was supported by the law and the evidence. He referred to *Gregson v. Henderson Roller Bearing Co.* (1910), 20 O.L.R. 584.

May 5. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Lennox, J., without a jury, in favour of the plaintiffs.

James Rourke and Dennis M. Rourke were brothers. James was a bachelor, and Dennis was married, and James resided with Dennis for many years, first at the residence of the latter in the township of Maidstone, and afterwards at his residence in the city of Windsor, in the county of Essex, to which Dennis, with his family, had removed. After the removal, James developed symptoms of lunacy, with the result that he was admitted to the Asylum for the Insane at the city of London, Ontario, where he remained for some time, and Dennis was duly appointed by the Court to be the committee of his person and estate.

The date of the order declaring James a lunatic is the 16th June, 1908. On the 1st March, 1910, an order was made for the discharge of James from the asylum, and he was accordingly discharged. He did not, however, return to his former home with Dennis, but remained in the city of London, and resided at the House of Providence there, where he died on the 11th November, 1913. The order of the 16th June, 1908, declaring him to be a lunatic, was never superseded, and Dennis continued to act as committee until his own death on the 4th July, 1913.

In the month of April, 1911, Dennis handed over to the defendant James Raymond Rourke the sum of \$2,450 out of moneys

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belonging to James in his hands as committee, and, in the following month of September, a further sum of \$2,500 to the defendant Mary McBride, also out of the moneys of James in his hands as committee. The defendants James Raymond Rourke and Mary McBride are brother and sister and both children of Dennis. The only authority which it is claimed that Dennis had for making these payments, consisted in each case of a written order said to have been signed by James while residing at the House of Providence in London, directing the payments to be made by Dennis. The alleged object of the payment to the defendant James Raymond Rourke was to enable him to purchase a house at the city of Windsor, which afterwards was carried out, and the conveyance taken in his name. And the object of the payment to the defendant Mary McBride was to enable her to purchase a house at the town of Gravenhurst, which was done, and the conveyance in like manner was taken in her name.

And this action was brought by the executors of James for the purpose of having such payments disallowed, and the money recovered for the estate of James.

The grounds upon which recovery is sought are two: (1) that James, while the order declaring him a lunatic remained unrevoked and in force and the committee undischarged, was in law incapable of so dealing with his estate; and (2) that, in any event and apart from the order declaring him to be a lunatic, James was, when the alleged gifts were made, of unsound mind.

Lennox, J., proceeding apparently upon the second ground, found in favour of the plaintiffs. The following extract shews in brief the general view of the learned Judge: "There was no evidence to satisfy me that as a matter of fact James Rourke was of sound mind or capable of dealing with his property or moneys at the time of the alleged gifts or either of them, or at any time subsequent to June, 1908. The defendants have failed to prove recovery in the legal sense, though it is possible that his condition improved in some respects."

In the argument before us it was contended by the learned counsel for the defendants that the first objection was invalid, and that the case upon which it was based, *In re Walker*, [1905] 1 Ch. 160, in which it was held in the Court of Appeal that a lunatic so found could not, even in a lucid interval, execute a

valid deed by way of gift, was not intended to lay down a general rule and had no application to the facts of this case. Lennox, J., although he refers in his judgment to the objection, does not express a decided opinion upon it.

The law upon the subject was apparently examined with much care and particularity in *In re Walker*, which did not apparently turn upon any peculiarity in the facts, distinguishing it from this; and the conclusion reached, as expressed in the judgment, that the deed was null and void, is quite broad enough to cover, and does, I think, cover, such a case as this.

The objection, however, has, I think, a double aspect. It offers what is strictly a legal objection, which goes to the root of the matter, and it also has an important bearing upon the other objection, for under that objection the inquiry into the question of fact necessarily begins with the highly important circumstance that, before these gifts were made, the deceased had been declared by the Court to be a lunatic, and that when they were made the order was still unrevoked, and his estate in the hands of the committee appointed by the Court. Nor is the effect materially modified or minimised, by the circumstance of the lunatic's discharge from the asylum, for all that that amounts to, as explained by Dr. Robinson, the superintendent, is, that the asylum officials then regarded him as having so far improved that he was considered to be harmless and that he might safely be restored to his friends.

Agreeing as I do with the conclusion of Lennox, J., upon the question of fact, I am afraid I can add but little to what he has already said upon that subject.

As to the important feature of the occasion on which the written orders were obtained, no one was present but the deceased and the beneficiaries, and there is no evidence but theirs as to what actually took place. True, Sister Scholastic, who was called, deposed that the deceased after the interviews told her in each case what he had done. To that extent then it may be assumed to have been established that he had intellect and memory, but it does not carry one very far, having regard to all the circumstances. The same Sister also gave evidence that the deceased talked rationally, so far as she observed. And the Mother Superior, Mother Angela, gave similar evidence. But neither had had any opportunity of testing his business capacity.

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There is perhaps a little more in the evidence of Mr. Murphy, a barrister and solicitor who was called in to prepare a power of attorney for the deceased in the summer of 1913. Mr. Murphy, however, when he saw him, was unaware that the deceased had been a lunatic. What he saw, as described, was an old man in bed who was able to talk with apparent intelligence about his property and to express the wish that his agent, Mr. Halford, might have the widest powers of management. He also spoke to Mr. Murphy of changing his will, but in the end decided not to do so. Mr. Murphy said: "I thought the man was eccentric, but I don't think I knew at that time he had ever been in the asylum. There was no indication that he should be in an asylum from what I observed of him. He seemed to be pretty keen on money matters and knew his business pretty well." And Dr. Mugan's evidence, although in a negative form, is practically to the same effect. He said: "I have no cause or no reason to say that he was not in a mental condition to do business. My observation did not point to anything to indicate that he was not, or that he was, an insane man." Dr. Mugan had occasionally seen the deceased in the House of Providence, of which Dr. Mugan was a physician, but he, like the others, had had no opportunity of testing his business capacity. Dr. Robinson, the superintendent of the asylum, who was also called, did not assist the case of the defendants.

The theory of the defendants is, that there had been a complete recovery, and that the revocation of the order declaring the deceased a lunatic was practically a matter of form. That theory would have had more support if James had returned to his former home with Dennis and had resumed the personal management of his estate. They knew, or at least Dennis knew, that it was necessary, if James had really recovered, to have the order revoked, for he had discussed the matter with Mr. Cleary, his solicitor. But, it is said, he declined to make the application on the ground of expense. It is a pity, in view of what followed, that Mr. Cleary did not, as he had the opportunity of doing, advise against the irregularity, and indeed illegality, of what was proposed, when he drew for Dennis the order for the first gift, the one to the defendant James Raymond Rourke. His excuse is, that, as it left his hands, there was in it the alternative of a loan (afterwards struck out) instead of a gift; but the excuse is,

I think, very weak. He might, in any event, at least have recommended that independent advice should be supplied or at least tendered to James, and that the transaction, so irregular and so dangerous, legally, should be carried out in every respect in the strictest and most careful manner, so as to be able to shew, if required, that the deceased fully understood what he was doing, and that the act was indeed his own deliberate act.

Mr. Cleary does not seem to have been consulted in the case of the second gift, that is, the one to the defendant Mary McBride. There is, however, otherwise no substantial difference in their circumstances between them, and what I have said as to the one applies also to the other.

The money in each case seems to have gone into land which still stands in the names of the defendants James Raymond Rourke and Mary McBride. No relief by way of following the money is apparently asked on the record. If it had been, I think the plaintiffs would have been entitled to do so, and to have the liens realised, if necessary, by sale under the direction of the Court.

For some unexplained reason, no disposition seems to have been made at the trial of the claim to indemnity made in the pleadings and urged before us by the defendant Christine Halford as executrix of Dennis against her co-defendants. She is, I think, entitled to such indemnity without costs, although not, I think, to the lien to which, in my opinion, the plaintiffs were entitled: see *Moxham v. Grant*, [1900] 1 Q.B. 88; and the formal judgment should be amended accordingly.

I would otherwise dismiss the appeal with costs.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A.:—I agree with the learned trial Judge that the evidence falls short of establishing that James Rourke had regained a normal and sane condition when he signed the papers relied on to authenticate the transactions complained of. But, as these documents were to be acted on immediately, and were to affect and did affect his property, I am unable to see how the mental state of James Rourke is material to the issue raised. He had been declared a lunatic by an order made under the Lunacy

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Act on the 16th June, 1908. The effect of it was to create a disability which could not be disregarded while the order stood unreversed. It did not divest the lunatic of his property, but it did disable him from controlling or dealing with it. He was as incompetent to manage it or to part with it as if he had been born an idiot. The theory of the law is, that the Crown may intervene for the benefit of a person of unsound mind, and care for his person and estate. An order of Court is the mode employed to carry this into effect, as is declared by sec. 3 of R.S.O. 1914, ch. 68. Every precaution is taken before the order is made; it may be appealed from, and may be superseded if the lunatic regains his reason. But, while the order is in force, it is final (sec. 7, sub-sec. 8); and, as to the custody of the estate of the lunatic, it is effective upon the completion of the committee's security. The committee must manage the estate, under and subject to the discretion of the Court, for the benefit of the lunatic or of his family, and the statute makes special and detailed provision for its due management. The committee can only act on behalf of the lunatic upon the order of the Court.

It is inconceivable, having regard to the terms of the Lunacy Act, that the lunatic may himself deal with or in respect of his estate, either with or without the assent of his committee, while it is in the hands of the Court. The whole scope of the Act is directed to vesting "all the powers, jurisdiction and authority of His Majesty" in the Court, and providing for the exercise of control by the Court, its instrument being a committee, who acts only upon the order of that Court.

If, as was argued, the lunatic may initiate and complete transactions, whose validity is to depend upon his mental state when they are done, then the Crown would be compelled, in every such case, to enter into litigation with the lunatic or those who have thus acquired ostensible interests in his estate in order to assert its authority.

Such a state of affairs would be intolerable, and it is, in my judgment, impossible in face of the statute.

It was attempted, on the argument, to distinguish *In re Walker*, [1905] 1 Ch. 160, on the ground that in that case the lunatic was alive, and that here the lunatic was dead. But, as the impeached transactions took place during his lifetime and

were then consummated, to the detriment of the lunatic's estate, they directly affected the control of the estate, which was then vested in the Crown. The decision in *In re Walker* is based upon the principle that there cannot, after an order is made declaring lunacy, be a dual control, and that the Court will not, except in the way provided in the statute for superseding the order, inquire into the lunatic's state of mind, which is finally fixed while the order stands.

Hence it follows that the investigation which took place at the trial in this case was incompetent and should not have been entered upon.

For these reasons, I would dismiss the appeal. There is no good reason why an indemnity order should not now be made, as indicated by my brother Garrow.

Judgment below affirmed, with a variation.

[IN CHAMBERS.]

REX v. SWARTS.

Canada Temperance Act—Search-warrant—Information—Causes of Suspicion—Sufficiency—Question for Magistrate—Names of Persons Giving Information to Informant—Unlawfully Bringing Intoxicating Liquor into County where Act in Force—Jurisdiction of Police Magistrate—Evidence—Execution of Warrant by Informant—Offence—R.S.C. 1906, ch. 152, sec. 117 (c)—Saving Clause, sec. 117 (2)—Liquor Brought in by Accused for himself—Acceptance of Part of Testimony of Accused—Order for Destruction of Liquor under sec. 137—Effect of Quashing Search-warrant.

A constable swore to an information that he had just and reasonable cause to suspect and did suspect that intoxicating liquor was kept for sale, in violation of Part II. of the Canada Temperance Act, in the dwelling-house occupied by the defendant (in the county of Huron), and that the grounds of suspicion were "that the deponent is told on reliable authority that a package or box was taken into said dwelling-house last night which there is ground to believe contained intoxicating liquors."

Held, following *Rex v. Bender* (1916), 36 O.L.R. 378, that the causes of suspicion must appear in the information.

Here the causes were set out, and it was for the magistrate to decide whether reasonable cause to suspect a violation of the Act was disclosed. The magistrate having issued a search-warrant upon the information, his decision should not be interfered with.

There was no reason for compelling the informant to disclose the names of his informants, unless the magistrate saw fit to do so.

(2) The constable executed the search-warrant, and found 46 bottles of whisky and other spirituous liquors upon the defendant's premises, most of them in cases in a trunk, which was locked. The constable laid an information for unlawfully bringing intoxicating liquor into the county of Huron, con-

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trary to Part II. of the Act; the defendant appeared before the magistrate, the constable gave evidence as to what he had found, and a drayman testified that the trunk had been brought by him for the defendant from a railway station, to which it had come as baggage. The defendant testified that he had brought the liquor into the county of Huron from another county; and the magistrate convicted:—

Held, that the objection to the conviction that it was based upon evidence obtained by the informant in executing the search-warrant, was without force.

Ex p. McCleave (1900), 5 Can. Crim. Cas. 115, not followed.

Regina v. Heffernan (1887), 13 O.R. 616, and *Ex p. Dewar* (1909), 15 Can. Crim. Cas. 273, followed.

Held, also, that there was evidence upon which a conviction could be founded: bringing the liquor into the county was against the prohibition of sec. 117 (c) of the Act; and the defendant was not saved by sec. 117 (2), which does not cover the case of a person bringing into the county liquor not to any one but for himself (see the amending Act, 7 & 8 Edw. VII. ch. 71, sec. 1). Moreover, the magistrate was not bound, believing part of the defendant's evidence, to believe the remainder.

Rex v. Van Norman (1909), 19 O.L.R. 447, followed.

(3) An order for the destruction of the liquor naturally and properly followed the conviction: sec. 137.

A motion to quash the search-warrant, conviction, and order was refused.

Semble, if the search-warrant had been quashed, the conviction and order would not be affected.

MOTION by the defendant to quash a search-warrant, a magistrate's conviction of the defendant for unlawfully bringing intoxicating liquor into the county of Huron, contrary to the Canada Temperance Act, and an order for the destruction of the liquor found upon the premises.

May 5. The motion was heard by RIDDELL, J., in Chambers.

Loftus E. Dancy, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

May 6. RIDDELL, J.:—William T. Pellow, who had been employed by the Citizens' Social Service League of Goderich for the purpose of enforcing the Canada Temperance Act in the county of Huron, was duly appointed constable for the county.

Having his suspicions of Clarence Swarts, the son of a hotel-keeper, but living in his own house, Pellow swore to an information "that he hath just and reasonable cause to suspect and doth suspect that intoxicating liquor is kept for sale in violation of Part II. of the Canada Temperance Act in the dwelling-house occupied by Clarence Swarts. . . . The grounds of such suspicion are that the deponent is told on reliable authority that a package or box was taken into said dwelling-house last night which there is ground to believe contained intoxicating liquors."

Under the provisions of the Act, R.S.C. 1906, ch. 152, sec. 136, the Police Magistrate issued a search-warrant and placed it in the hands of Pellow, who proceeded to search the house of Swarts.

He asked Mrs. Swarts (her husband was not at home) for a box or trunk which came on the previous night. She said it was upstairs—he went upstairs and found the trunk, locked—he found also that there were two bottles of whisky open in the house. He took away the trunk and opened it—he found three cases of whisky, Hiram Walker & Co. Imperial, 1910, unopened, and a fourth case containing an assortment of London Dry gin, Fine Old Scotch whisky, Old Vatted Glenlivet whisky, and Sander-son's Mountain Dew, eight bottles—this case was open and there were two wrappers indicating that there had been two other bottles in this case. He found also a box of cigars, but it is not contended that it plays any part in the case. Swarts never came to claim the articles. Three dozen and eight bottles of liquor having been found in this way, the Inspector laid an information for unlawfully bringing intoxicating liquor into the county of Huron, contrary to the provisions of Part II. of the Canada Temperance Act.

The defendant appeared before the Police Magistrate, Pellow gave evidence of the facts above set out, and a drayman, Tait, proved that the trunk had been brought by him for Swarts from the Grand Trunk Railway station, to which it had come as baggage; the baggageman at the station could not tell whence the trunk came; and there the prosecution rested.

It is said that the magistrate thought sufficient had been proved to put the defendant upon his defence under sec. 141 of the Act; and that the defendant, against the advice of his counsel, insisted on giving evidence.

It may well be that, had the defendant not given evidence, there would have been no proof of the offence of bringing liquor into the county, and that he would have been acquitted—but he did give evidence, and I am (as was the Police Magistrate) entitled to look at that evidence in deciding the case.

Nor is he advanced by the fact that sec. 141 could not be invoked in a case of this kind, it being specifically applicable only to prosecutions "for the sale or barter or other unlawful disposal of intoxicating liquor," which this was not.

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He might have refused to give evidence, as his counsel advised; but he chose his own course and must abide the consequences.

The defendant proved that he had brought the liquor from Guelph into the county of Huron; and the Police Magistrate convicted. The Police Magistrate then gave an order for the destruction of the liquor, under sec. 137.

A motion is now made to quash search-warrant, conviction, and order for destruction.

The first ground advanced for quashing the search-warrant is, that the "reasonable cause to suspect" is not set out in the information.

My learned brother Sutherland in the case of *Rex v. Bender* (1916), 36 O.L.R. 378, a similar case, held that, if the information does not disclose "facts and circumstances shewing the causes of suspicion," the warrant must be deemed to have been improperly issued and must be quashed. In this the learned Judge followed *Rex v. Kehr* (1906), 11 O.L.R. 517. In the *Kehr* case, however, the statute was imperative that the form must be followed; here the form *may* be followed, not *must* be followed.

In *Ex p. Coffon* (1905), 11 Can. Crim. Cas. 48, the complaint was laid on information and belief, and the causes of suspicion were not disclosed—and the Supreme Court of New Brunswick held that the magistrate in such a case should examine the complainant and witnesses *ex parte* under oath, and should not grant a warrant of arrest unless he should entertain the like suspicion—this was of course not an application for a search-warrant.

Rex v. Townsend (No. 2) (1906), 11 Can. Crim. Cas. 115, *Regina v. Walker* (1887), 13 O.R. 83, and other cases, have been cited; but I do not analyse them, considering myself bound by the decision of my learned brother that the causes of suspicion must appear in the information.

In the present case, the causes are set out; these might not be sufficient for some magistrates, but I cannot say that a magistrate was necessarily wrong in considering that what the information disclosed gave him reasonable cause to suspect a violation of the Act. It is the magistrate that is to decide whether there is disclosed reasonable cause to suspect; and, unless he is clearly wrong, his decision should not be interfered with.

It is argued that the name of the person who told Pellow should have been disclosed, and such cases as *Gibbons v. Spalding* (1843),

11 M. & W. 173, *Gilbert v. Stiles* (1889), 13 P.R. 121 (cases of *ca. re.*), *Ex p. Grundy* (1906), 12 Can. Crim. Cas. 65, *Rex v. Lorrimer* (1909), 14 Can. Crim. Cas. 430, warrant of arrest, &c., are cited. But here we are concerned with suspicion only, and I see no reason for compelling the informant to disclose the names of *his* informants, unless the magistrate saw fit to do so.

As to the conviction, it is said, first, that there was no adjudication and note—this is without foundation, as at the close of the evidence a sufficient note is to be found (even if that is now necessary).

Then it is said that the informant was given the warrant, that he made the search and that the conviction is based on evidence so obtained. *Ex p. McCleave* (1900), 5 Can. Crim. Cas. 115, Supreme Court of New Brunswick, I do not pretend to understand; but against it may be placed *Regina v. Heffernan* (1887), 13 O.R. 616, and *Ex p. Dewar* (1909), 15 Can. Crim. Cas. 273, Supreme Court of New Brunswick (which I follow), and which decide that this objection is without force.

The next objection is that there is no evidence upon which a conviction could be founded.

It was proved that the defendant brought 46 bottles of liquor into the county; this is against the prohibition of sec. 117* (c): "No person shall . . . bring . . . into any such county . . . any intoxicating liquor."

The defendant contends that he is saved by sec. 117 (2): "Paragraph (c) . . . shall not apply to any intoxicating liquor sent, shipped, brought or carried to any person . . . for his . . . personal or family use . . ." But this saving clause does not cover the case of a person bringing into the county liquor not to any one but *for* himself.

Moreover, the Police Magistrate was not bound, believing part of the defendant's evidence, to believe the remainder—he might accept the inculpatory and reject the exculpatory part: *Rex v. Van Norman* (1909), 19 O.L.R. 447.

Considering the large quantity of liquor, the secret manner in which it was brought from the station to the home, and all the other facts of the case, I think the Police Magistrate had the right to find as he did.

*The section referred to is, by 7 & 8 Edw. VII. ch. 71, sec. 1, substituted for sec. 117 of R.S.C. 1906, ch. 152.

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The order to destroy naturally and properly follows such a conviction: sec. 137.

The application must be refused with costs.

Even had I been obliged to quash the search-warrant, it is plain on the authorities that the conviction and destruction order would not be thereby affected.

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[IN CHAMBERS.]

May 8.

REX V. BEDFORD.

Canada Temperance Act—Search-warrant—Information—Grounds for Suspicion—Keeping Intoxicating Liquor for Sale—Evidence—Conviction—Police Magistrate—Jurisdiction.

In a county where the Canada Temperance Act was in force, a search-warrant was issued by a Police Magistrate upon an information which stated, in regard to the defendant's hotel, "that the deponent knows that intoxicating liquor is being brought to the said hotel and persons are resorting there, as the deponent has good reason to believe, for the purpose of drinking the same:"—

Held, that the magistrate might well consider that there were reasonable grounds of suspicion; and the search-warrant should not be quashed.

The Inspector laid an information against the defendant for unlawfully keeping intoxicating liquor for sale, contrary to the Act, and the defendant was convicted by the Police Magistrate:—

Held, that there was evidence to support the conviction, and it should not be quashed.

A tavern-keeper who keeps his bar-room bolted, to be opened to admit such persons as he chooses, who keeps whisky-glasses all smelling of whisky, who rings up on his cash register the price of two drinks in his bolted bar-room just before two men come out of it and who can give no reason why he should, one of whose customers is seen to take a drink from one of the whisky-glasses followed by a drink of water—cannot complain if the magistrate comes to the conclusion that whisky or other intoxicating liquor was sold or kept for sale.

MOTION by the defendant to quash a search-warrant and a Police Magistrate's conviction of the defendant for unlawfully keeping intoxicating liquor for sale in his hotel in the town of Goderich, in the county of Huron, contrary to the provisions of Part II. of the Canada Temperance Act, R.S.C. 1906, ch. 152, in force in that county.

May 5. The motion was heard by RIDDELL, J., in Chambers.

Loftus E. Dancey, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

May 8. RIDDELL, J.:—John Bedford is the proprietor of the Bedford House, a commercial hotel in Goderich, in the county of Huron. That county has the fortune, good or bad, to be under the Canada Temperance Act, and John thought that in a “Scott Act county” the proper course was to keep the door of his bar-room shut, locked and bolted—so far the Court is entirely with him. But, unfortunately, the door occasionally relaxed, and certain known persons were allowed inside, which was the *fons et origo mali* to the defendant.

Suspicion was raised that more than water was being consumed within the room so closed and tyled—a search-warrant was issued, and the “whisky detective” entrusted with its execution: he made a search, but found nothing in the way of liquor. It was said by counsel on the argument that it is the custom in that town for some publicans to carry their supply on their persons, which are, of course, sacred from intrusion under a search-warrant—there is, however, no evidence in this case of any liquor being so carried by Bedford, it is not even alleged that his pockets exhibited any suspicious bulge such as might be caused by a flask, whether the unassuming four ounce “pocket-pistol” or the quart-size “family friend.”

What the detective did find, however, induced the Inspector to lay an information for unlawfully keeping “intoxicating liquor for sale, contrary to the provisions of Part II. of the Canada Temperance Act.”

Bedford was convicted (for a second offence) and sentenced to pay a fine of \$100 and costs \$9.39, or to be confined for 30 days in gaol.

A motion is now made (1) to quash the search-warrant and (2) to quash the conviction.

Several of the grounds are the same as those taken in *Rex v. Swarts*, decided by me on the 6th instant (*ante*); and, for reasons set out in that case (which I do not repeat), these grounds are insufficient.

Here the reasons for suspicion are “that the deponent knows that intoxicating liquor is being brought to the said hotel and persons are resorting there, as the deponent has good reason to believe, for the purpose of drinking the same.” It is impossible, I think, to say that the magistrate could not consider the above

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as reasonable grounds of suspicion. The search-warrant should not be quashed.

Then as to the conviction, the detective went to the hotel, saw men in what had been "drinking rooms" in non-prohibition days; the bar-room door was locked, but opened to let in certain persons, and then bolted again—the detective, as he went in, saw one Captain McK. with a glass to his mouth—a whisky-glass, which is said to be quite different from a wine-glass or a water-glass—standing at the bar, then taking some water in the glass and drinking it. He thought that this was a drink of whisky followed by a "chaser," and his suspicions were confirmed by the smell of the glass, which he seized at once and smelt. There were in the bar four glasses of this size, apparently with thicker bottoms to make the drink look bigger, and all smelt of whisky—the detective knows and cannot be mistaken. It was not the smell of "temperance wine," which, the expert says, "has a sweeter smell than whisky or beer." The other whisky-glasses smelt very much stronger of whisky than that the Captain had been using.

Captain McK. could not detect any smell of whisky when he took his drink; "but," he says, "it would have to be strong before I could notice it." Bedford himself, being asked if the four glasses smelt of whisky when the officer looked under the bar, says, "I don't think he did, for they were washed out and put on the bar."

Then, just before the officer went into the bar-room, he heard the cash register within ring; and two men came out—when he went in he saw the register displaying fifty cents, the customary price for two drinks. Bedford says that this was for two "quarters" he took out of his vest pocket, but cannot remember who gave them to him—he can give no reason for putting them in the register at that time or at all.

Some of the witnesses called drank only water, they do not say why they had to go to the bar-room for that innocuous fluid—it may possibly have been "fire-water," although it is not proved that it was. One took only a harmless wine: and none would swear that he had "liquor." It is of course notorious that in Scott Act counties a terminology comes into use unknown elsewhere—e.g., I have heard one witness call white-wheat whisky by the name of "pop-pop,"—but there is here no direct evidence of any one to whom liquor was sold by the defendant.

There has been, in some cases in the past, in our own as well as in other Courts, a display of judicial nescience which seems to go to a great length—e.g., in a liquor case one of our Judges was unable to find proof of intoxication in the evidence of witnesses who swore that the person charged was “full,” as they did not say whether he was full “of spirituous liquor, pop, water, or wind” (*per* O'Connor, J., in *Regina v. Kennedy* (1885), 10 O.R. 396, at p. 400). But there is nothing to prevent a magistrate, at least when sitting as a judge of fact, from exercising his common sense and using every-day knowledge.

A tavern-keeper who keeps his bar-room bolted, to be opened to admit such persons as he chooses, who keeps whisky-glasses all smelling of whisky (most of them very strongly), who rings up the price of two drinks in his bolted bar-room just before two men come out of it and who can give no reason why he should, one of whose customers is seen to take a drink from one of the whisky-glasses followed by a drink of water—cannot complain if the magistrate comes to the conclusion that he was selling whisky or “liquor”—men have suffered long terms of imprisonment on less evidence.

The motion must be dismissed with costs.

[APPELLATE DIVISION.]

JAROSHINSKY v. GRAND TRUNK R.W. Co.

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March 19.
May 12.

Railway—Level Highway Crossing—Injury to Person Attempting to Cross—Evidence—Negligence—Contributory Negligence—Findings of Jury—Form of Questions—Trial—Supplementary Findings—Absence of Warning—Failure to Ring Bell—Competence of Witnesses—Negativizing by Jury of Alleged Failure to Sound Whistle—Evidence of Person Injured—Contradiction—Denial of New Trial.

At a dangerous level highway crossing of the lines of railway (five tracks) used by the Grand Trunk and Wabash companies, at a time when there was much traffic in the highway, the plaintiff attempted to cross the tracks; he passed in front of a Wabash locomotive engine standing close to the sidewalk, and was struck by the engine of a Grand Trunk train, which he could not see approaching, and was injured. He brought this action, to recover damages for his injuries, against both companies; at the trial, the action was, as against the Wabash company, taken from the jury and dismissed. As against the Grand Trunk company, questions were left to the jury, in answer to which they found in writing: (1) that the plaintiff's injury was caused by the negligence of that company; (2) that the negligence was, “Did not sound proper warning.” When the second answer was read in the court-room, the trial Judge asked, whether by “warning”

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the jury meant the bell or the whistle; the foreman answered "The bell;" and the Judge added to the written answer the words "as to bell." Question (3) was: "Or was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?" There was no written answer to this question; in the court-room, the foreman (questioned by the Judge) said that the jury were satisfied that the plaintiff did not cause the accident by his own negligence, and the Judge put down the answer "No." No objection to this was taken by any one. Judgment was entered by the trial Judge for the plaintiff against the Grand Trunk company for a sum assessed by the jury as damages; the Grand Trunk company appealed and asked, in the alternative, for a new trial; there was no appeal as to the Wabash company:—

Held, that the case could not properly have been withdrawn from the jury; the trial and the findings were not altogether satisfactory, but there was some evidence to support the findings of negligence and absence of contributory negligence; and there should not be a new trial (MASTEN, J., *hesitante*).

Per MEREDITH, C.J.C.P.:—Upon the evidence, it might have been found that the negligence of the Wabash company, in regard to the position in which they had placed their train, was the primary cause of the plaintiff's injury, if he were not himself the primary cause. The form of the questions submitted to the jury was embarrassing; and what took place when the verdict was rendered was not the most proper way of taking and recording the verdict, although no objection was made.

It was contended by counsel for the Grand Trunk company that the evidence of witnesses who did not hear either the whistle or the bell should be excluded because the jury had found that the whistle was sounded—that one who did not hear the greater sound could not be a witness regarding the lesser:—

Held, per Curiam, that, while the jury must be taken to have negatived the plaintiff's right to recover on the ground that the whistle was not sounded, that was different from a finding that the whistle *was* sounded; it may have meant that the failure to sound the whistle was not sufficiently proved.

It was also contended that the testimony of the witnesses who testified merely that they did not hear the bell, and who were not asked whether they could have heard it if it was rung, should be excluded:—

Held, per Curiam, that a witness is qualified when it is shewn in any way that if the bell had rung he could have heard it: if it is self-evident that the witness is not deaf, and if he is shewn in evidence in any way to have been in hearing distance, he is a competent witness, whatever may be the weight of his testimony.

The plaintiff, who was a foreigner, testified at the trial, through first one interpreter and then another; at one time he swore that when he passed the Wabash engine he looked both ways, and at another time he gave a different account:—

Held, per Curiam, that all his statements must be submitted to the jury, and it was for the jury to say whether he took all proper care.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

ACTION against the Grand Trunk Railway Company and the Wabash Railroad Company to recover damages for injuries sustained by the plaintiff when struck by a locomotive engine in attempting to cross a line of railway.

At the trial, before FALCONBRIDGE, C.J.K.B., and a jury, at Sandwich, the action was dismissed as against the Wabash company; and the case went to the jury as against the Grand Trunk company.

Questions were left to the jury and were answered by the jury in writing and supplemented orally by the foreman in the court-room, to the following effect: (1) The injury which the plaintiff sustained was caused by the negligence of the Grand Trunk Railway Company. (2) The negligence was that the company "did not sound proper warning" by "the bell." (3) The plaintiff did not cause the accident by his own negligence. And the jury assessed the plaintiff's compensation or damages at \$1,254.

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F. W. Wilson, for the plaintiff.

D. L. McCarthy, K.C., and *W. E. Foster*, K.C., for the defendants.

March 19. FALCONBRIDGE, C.J.K.B.:—The action was dismissed by me at the trial as against the defendants the Wabash Railroad Company, without costs.

As to the Grand Trunk Railway Company, the jury answered questions.

Mr. McCarthy argued that, on the plaintiff's own evidence, his action ought to be dismissed: *Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838.

The examination and cross-examination of the plaintiff were most unsatisfactory. He is an illiterate Russian—he cannot read or write his own language, and, disclaiming any knowledge of English, his evidence was given through the medium of an interpreter. There were two of them in Court, and one criticised the other's rendering of the answers.

The plaintiff was therefore understood to give at least two different accounts of where he was when he looked to the right and to the left. I think I ought to assume that the jury accepted the answer which would place him where he ought to have been when he looked, i.e., just before crossing. As to the alleged want of warning by bell, I must accept the jury's finding, and I enter the verdict for the plaintiff accordingly.

The damages are very moderate and reasonable.

Judgment for the plaintiff for \$1,254 against the Grand Trunk Railway Company with costs.

The defendants the Grand Trunk Railway Company appealed from the judgment of FALCONBRIDGE, C.J.K.B.

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April 27. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

D. L. McCarthy, K.C., for the appellants. There was no evidence to support the findings of the jury. The testimony of the witnesses who swore that they heard neither whistle nor bell should be excluded, the jury having in effect found that the whistle was sounded. A person who could not hear the greater sound could not hear the lesser. The testimony of those who swore merely that they did not hear the bell, but who were not asked whether they could have heard it if it had rung, should also be eliminated: *Ellis v. Great Western R.W. Co.* (1874), L.R. 9 C.P. 551. The plaintiff himself proved his own contributory negligence when he swore that he had not looked after passing in front of the Wabash train.

F. W. Wilson, for the plaintiff, respondent. All the matters submitted to the jury were for their decision, and they rightly found negligence on the part of the appellants: *Gray v. Wabash R.R. Co.* (1916), 35 O.L.R. 510. The question of contributory negligence was for the jury, and upon conflicting testimony the jury had found for the plaintiff: *London and Western Trusts Co. v. Lake Erie and Detroit River R.W. Co.* (1906), 12 O.L.R. 28; *Vallee v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 224.

May 12. MEREDITH, C.J.C.P.:—If the defendants the Wabash Railroad Company were parties to this appeal, there should be a new trial of this action, because otherwise complete justice cannot be done in it: but those defendants were, at the trial, while counsel were addressing the jury, but before the jury was charged, dismissed out of the action, and have since been treated as if they were not parties to it.

I should have thought that, upon the evidence adduced at the trial, it might have been found that their negligence was the primary cause of the plaintiff's injury, if he were not himself the primary cause of it; and that, but for their negligence, he could not have any cause of action against their co-defendants.

And, besides that, the form of the questions submitted to the jury was embarrassing; and what took place when the verdict was rendered was not the best way of taking and recording the verdict: and so all things point to an unsatisfactory trial.

The Wabash Railroad Company's servants had backed a train down until it stood with the front part of its locomotive engine close to, if not actually overlapping to some extent, the sidewalk of the public street; and they kept it in that position, for the purpose of letting their co-defendants' train pass it, on the next track, until it did pass, injuring the plaintiff in so passing.

The street was one much used by highway traffic of all kinds; the railway tracks crossed it on a level with it, and were five in number; plainly a dangerous crossing, calling for more than ordinary care on the part of every one affected by, or concerned in, its dangers.

The time of the day was when workmen in large numbers were returning to their homes from their work; and there were, according to one witness, two girls, and, according to another witness, a woman and a girl, going to cross the tracks in the same way, and at the same time, as the plaintiff went to cross them.

The position in which the Wabash Railroad Company's servants placed their train was such as completely to shut out the view of the on-coming train, of their co-defendants, by any one proceeding to cross the tracks, as the plaintiff, and the others I have mentioned, were: and, besides that, there was such noise as this locomotive engine, close to, or partly on, the sidewalk, created, and the uncomfortable, if not alarming, sensations which close proximity to such an engine causes to a good many persons.

And there was no reason whatsoever for these servants taking up such a position; no reason why they might not just as well have gone further down the track, so that there could be no interference with the line of view, nor any distraction or disturbance, of men, women, or children desiring to cross the tracks.

That alone seems to me to have been a plain piece of disregard of the rights and welfare of others, inexcusable on the part of those in charge of this engine and the cars attached to it; but that was not all. In that position it was they who signalled to the other trainmen to bring on their train as they did: and, although doing all that, took no steps whatever to warn men, women, or children, about to cross the track, of their danger which the on-coming train that they had so brought on, caused: but seem, in laziness and indifference, to have remained in or near their engine and train, oblivious, or indifferent, to the danger

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to life and limb they were creating, unless they gave such warning. I cannot at all understand why the plaintiff so tamely submitted to the dismissal of the action, without going to the jury, as against these defendants; I can understand why the defendants did if they were acting in concert, because it took away the plaintiff's much stronger cause of action.

But so the parties have left the case; and so it must be dealt with now.

Against the appellants the jury found that the plaintiff's injury was caused by their negligence in not sounding proper warning: and, this finding being a doubtful one, the jury were asked whether they meant the bell or the whistle, and the foreman answered "the bell." It was then discovered that they had not answered the question as to the plaintiff's negligence or contributory negligence: but it does not seem to have been discovered that that was caused by the peculiar form of the question in this respect. The first question was, in effect, whether the plaintiff's injury was caused by the negligence of the appellants; and then followed, after a question as to the character of the negligence, the unanswered question, which was in this unusual and embarrassing form: "*Or* was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?" The jury, no doubt, saw at once that the questions gave them but a choice of one of two things: was it the appellants' *or* was it the plaintiff's negligence that caused the accident: so they were quite right in thinking that the one answer necessarily covered both questions, it was the one *or* the other thing they were to find.

If the trial Judge had observed the error in inserting the word "*or*" between questions 2 and 3, I am sure he would have struck it out and have charged the jury again, making it very plain to them that questions 1 and 3 should not be alternative, that both, quite consistently, could be answered in the affirmative, and would have directed them to retire and deal with question 3 in the light of his further charge.

Not observing it, the Judge elicited an answer from the foreman to question 3 in this, far from satisfactory, manner:—

"(3) Or was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?"

"His Lordship: Do you find that he was not guilty of negligence? You have not answered that.

"The Foreman: The railway.

"His Lordship: You are satisfied he did not cause the accident by his own negligence?

"The Foreman: Yes.

"His Lordship: Then I will put down the answer 'No.'"

Instead of the jury having had the separate and independent character of the question as to contributory negligence made plain to them, they were asked: "You are satisfied he did not *cause* the accident by his own negligence?" And the answer to this very leading—and may I not say misleading because of its words "*cause* the accident," as well as its general form?—question was merely "Yes." If the matter stood thus, I could not be satisfied in letting the judgment, directed to be entered upon the verdict, stand: but it does not; the Judge then told the jury that he would put down as their answer to question 3 the word "No:" and he did so, without objection by any juror, and, that which is more important, without any objection by counsel for any of the parties, although counsel for all were present: and no objection, in that respect, has been made, to the verdict or judgment, upon this appeal. The written verdict must therefore prevail, as it did in the case of *Gray v. Wabash R.R. Co.* (1916), 35 O.L.R. 510, in which case there was nothing but the foreman's personal view, expressed in the words, "I could not go further," etc.—and words expressed under unfavourable circumstances—opposed to it. But, nevertheless, it is far from being a verdict so pronounced and so taken as quite to bring a sense of complete justice done.

That brings me down to the main, if not the only, grounds urged in support of this appeal, namely: that there was no evidence upon which reasonable men could find that the proximate cause of the plaintiff's injury was a failure on the part of the appellants' servants to ring the bell of the locomotive engine which cut the plaintiff's arm off; or could find that the plaintiff was not guilty of contributory negligence.

Upon the question of the ringing of the bell, the weight of the testimony is decidedly in the appellants' favour; and is so without giving effect to Mr. McCarthy's two unusual contentions: the

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first of which was that the evidence of those witnesses who did not hear either whistle or bell should be excluded because the jury had found that the whistle was sounded; that one who did not hear the greater sound could not be a witness regarding the lesser; but I am not able to accept the statement of fact, upon which this contention is based, that the jury must have found that the whistle was sounded; it is true that placing their verdict on the fact, as they found it, that the bell was not rung, they must be taken to have negatived the plaintiff's right to recover on the ground that the whistle was not sounded; but that is different from a finding that the whistle was not sounded; it may very well have meant that failure to sound the whistle was not sufficiently proved for the jury to have found whether it did or did not—therefore not proven only. But the case does not turn upon this point; or upon the other, which is: that the testimony of the witnesses who testified merely that they did not hear the bell, and who were not asked whether they should have heard it if it had rung, should be excluded. It is not always necessary to ask such a question, though invariably in cases tried before me it has been asked: nor am I quite sure that in strictness it is quite a proper question. But the law of evidence upon this subject is simple and general: no witness is competent to give any evidence until he qualifies himself; in such a matter as this a witness is qualified when it is shewn in any way that if the bell had rung he could have heard it. For instance, if a witness testifying in the first instance, irregularly, as to the ringing of a bell, answers "Yes" or "No," and afterwards testifies that he was not at the place in question at all, but that he knows it did or did not ring because his wife was there and told him so and that he would sooner take her word for it than his own, he is disqualified, and his whole testimony in that respect should be rejected. But, if it is self-evident that the witness is not deaf, and if he is shewn in evidence in any way to have been in hearing distance, he is a competent witness, however little, or however much, weight his testimony may have.

The circumstances of the case favour the testimony that the bell was rung: it worked automatically and was said to be in proper order: the fireman, whose duty it was to ring it when not working automatically, and who had the best knowledge of the fact, testified that he also rang it with the bell-rope, a thing

that habit and a desire to be sure would impel: the train was coming to a very wide level highway crossing, it had had to wait until the Wabash train had backed down upon another track, and had then been signalled to come on, and it was the workmen's home-returning hour from the great factory in the neighbourhood, and so it was just one of those occasions on which the fullest warning should, and ordinarily would, have been given; just one of those things which, if done, would be well described by what was testified to have been said by the driver of the Wabash engine at the time: "Carter," the driver of the Grand Trunk engine, "is making a lot of noise coming up to-day."

To disregard altogether the testimony of the trainmen, because they may be interested in the success of the defence of the action, is altogether wrong. To attempt, as is sometimes done, to treat it as something in the nature of a joke, is inexcusable; and the more so when a verdict is rendered or sought on the testimony of a plaintiff alone, notwithstanding his greater interest in the success of his action. There is no good reason for treating the testimony of trainmen, in an accident case, any differently from that of any other class of witnesses giving testimony, whether alike interested or disinterested, in any other kind of case: and sometimes the contrast between the faith in, and not infrequently deference to, trainmen, by jurors, and others, proceeding by train to, or returning from, the Assizes, and their treatment during some trials and in some verdicts, are in marked contrast; and not extremely creditable to those who create the contrast. It would be concealing the truth if one did not say that to-day, as well as in years past, jurors sometimes, in cases such as this, exchange the scales of justice for the scale of pity; a thing which might be distinctly creditable to them if the hand of pity reached their own pockets only.

But there was testimony that the bell did not ring, a good deal of testimony, however little its weight might be in some minds: take for instance the witness Borland, who was driving the waggon of an express company and waiting for an opportunity to cross the tracks at the place in question, and so looking out for moving trains and engines, his mind intent on driving across at the first moment of safety; he heard the whistle but did not hear the sound of any bell. The trial Judge, rightly, could not have "nonsuited" on this ground.

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And now I come to the main point involved in this appeal: Could reasonable men, acting conscientiously, have found, upon the whole evidence in the case, that the plaintiff was not guilty of contributory negligence? And, if there were no exceptional circumstances favouring the plaintiff, I should unhesitatingly answer that question with an emphatic "No:" and would add that his conduct shewed an entire absence of any kind of influence of the first law of nature.

Who are they who mainly suffer such injuries? Full-grown men, who ought, if they used their common sense, to suffer least. Why is it that women and children suffer less? And why even domestic dogs apparently still less? Because familiarity with such dangers breeds indifference to, if not contempt of, them in men; that and man's self-deceiving conceit in his own power to "take care of himself."

If women and children, if even domestic animals, take some precaution which saves them: if even the piccaninnies of the South lay down the true doctrine in their sometime familiar refrain: "Oh! look to de Eas'; And look to de Wes'; And see the bullgine a-coming; Then get off de track; Or she'll hit you a smack; And land you on de udder side Jordan"—what excuse can this plaintiff, or any one in his behalf, offer, for not looking, and seeing the danger, and avoiding the injury, an injury exceedingly undesirable on all hands, including the country of the man's adoption, which, like other countries, is not partial to maimed men?

If the obstruction to the man's view had been a fixed and unattended one, such as a fence, or even a standing car, he would be without excuse; and I cannot think any unprejudiced person would venture to say that he was not plainly "the author of his own injury." The only ground upon which he could be exculpated would be that the law permitted him to close his eyes and stop his ears and yet hold the appellants liable if a jury should find that the bell did not ring: that such is not the law every one must know, as well as that, it may be, the law goes too far in depriving an injured person of all compensation, if by the exercise of ordinary care he could have avoided his injury, no matter how negligent were those who caused his injury.

Where there are no exceptional circumstances, a person going into danger must take those precautions which reasonable per-

sons would ordinarily take in the same circumstances. To have crossed without taking any care would have been, as I have said, more careless than even the man's dog would have been. To say in one breath that he looked, and in another that he did not, affords no evidence that he took any such care. It would be so, too, if he had throughout said that he did look; because then he would have been fairly and squarely within the pincers of the logic of the Lord Justice frequently referred to: "If you did not look you were negligent: and if you looked and did not see you were negligent:" and so having both looked and not looked, if judged by his own testimony, the plaintiff is doubly condemned.

If the man looked, why was he hurt? Did he look too late? If so, that look does not count in his favour, it condemns him. If he did look, and took his chances of getting over in time, a thing consistent with all the testimony regarding his running or hastening and turning out, then he took his life and limbs in his own hands, and must suffer the consequences. And that he did not, as the others did—men, children, and a woman—is also very much against him; what they did, and were uninjured, is pretty good evidence of what would be done ordinarily.

But there were exceptional circumstances—there are in most of the cases that come before this Court. Cases would not be brought here if there were not. Few are foolish enough to bring an action with a nonsuit staring them in the face.

The special circumstances are those I have already referred to: the Wabash shunting engine, and cars attached, had just been brought down, by the yard crew, and placed so as to obstruct the view, so as to make a real trap for the unconscious and unwarned; the crew had signalled the other engine to come on; they saw and knew of the traffic intending to cross the place that this engine must pass over, traffic on foot, including men and children and at least one woman, according to the testimony, as well as at least one horse and waggon and a driver: and there were four of these yard and engine men—the yard crew—all, or at least some, of them, idle: in these circumstances, I am not prepared to say that reasonable persons, acting ordinarily, under those circumstances, might not have proceeded to cross the track, on their way home from their work, in the faith that, if there were any danger, these idle men, who were creating it, would stop or

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otherwise warn them: and so the trial Judge rightly could not have withdrawn the case from the jury on this point..

The result is that, in my opinion, the verdict and judgment cannot be interfered with on any ground of right the appellants have to attack it: and few indeed should be the cases, of this character, in which a new trial should be granted in the absence of such a right: a new trial being such an extremely hard thing upon him who has regularly won the victory.

Though by no means satisfied that complete justice has been done, I would dismiss this appeal, seeing now no fair and reasonable means by which it can be made completer, now that the Wabash Railroad Company are beyond the reach of the arm of this Court—though if in truth there be some arrangement between these defendants as to bearing the brunt, one need have no regrets because of the result of this appeal.

RIDDELL, J.:—The plaintiff, a Russian living at Ford City, on Drouillard road, at a little distance south of the railway tracks used by both the Wabash and the Grand Trunk Railway companies, and employed by the Ford company north of the tracks, was, at the close of his work for the day, going home about 4.45 p.m. on the 2nd September, 1915. Crossing one of the lines of rail, he was struck by an engine of the Grand Trunk company and somewhat seriously injured.

He brought this action against both railway companies, failed as against the Wabash, but had a verdict for \$1,254 against the Grand Trunk—the Grand Trunk now appeal.

There are five lines of rail which cross Drouillard road, substantially parallel and close to each other. On that furthest north stood an engine (with some cars) facing east, and with the cow-catcher close up to the western sidewalk, along which the plaintiff was proceeding southward—this was a Wabash train, and the engine was letting off steam. The plaintiff, thinking it was going to move east (it had, he says, been moving east till he came within 5 or 6 feet), stopped and looked at it, but, finding that it did not move, he passed south in front of the engine and remembers nothing more till he was in the hospital.

After he walked in front of the Wabash engine “he did not look,” “he did not see nothing, he did not look,” “he looked both ways

and he did not see anything." He does not know what struck him; the man who was with him, he thinks, stopped talking to some one and he left him there and he does not remember that man yelling at him and telling him not to cross—after he started to go forward, after looking at the standing train, "he looked first one way and then the other way," he looked "on the right first and then on the left, that would be west and east:" he was close up by the train "when he looked both ways . . . when he passed the engine, he says." This is the story, as told in the first day of the trial, through an interpreter—on the second day another interpreter is on hand and the plaintiff gives further evidence.

His counsel, Mr. Wilson, says: "There is a question as to whether he understood his answers as to when he looked in the two directions. There is another interpreter here this morning. . . . There were three questions which he answered yesterday which I wanted to clear up: the first one, as to whether he looked both ways, and where he was when he did look; and the other was as to whether he stopped there two minutes or two seconds."

(The last question we need not pursue.)

The new interpreter is sworn, and the evidence proceeds thus:—

"His Lordship: The question is, where was he when he first saw the standing train? A. (through interpreter Sam Peisener): He was right near there.

"Q. Right near the train; near the crossing, how near in feet? A. Five feet.

"Q. He has told us at some point he looked both ways, ask him where he was when he looked? A. That was when he was five feet from the train that he was looking both sides.

"Q. Does he mean that was before he was crossing the track at all? A. When he was looking both sides he did not pass the track yet.

"Q. Was that the only time he looked both ways? A. That was the only time."

One Tatro, who was with the plaintiff walking south, stopped about three feet north of the crossing; the plaintiff walked on, and started to go across: Tatro saw the smoke of the Grand Trunk engine over the top of a Wabash box-car—the engine approaching the crossing from the west—and called out to the

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plaintiff: "For God's sake look out, you are going to get hit." Just as he spoke, the engine struck the plaintiff—it was on the third track from the north, and the plaintiff was between the rails. Tatro says that the plaintiff started to run after he struck the second track.

Questions were left to the jury, and the following took place when the jury came in with their answers as follows:—

"(1) Was the injury which the plaintiff sustained caused by any negligence of the Grand Trunk Railway Company? A. Yes.

"(2) If so, wherein did such negligence consist as to the Grand Trunk Railway Company? A. Did not sound proper warning.

"His Lordship: Do you mean as to the bell or the whistle?"

"The Foreman: The bell, your Lordship."

"(3) Or was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?

"His Lordship: Do you find that he was not guilty of negligence? You have not answered that."

"The Foreman: The railway."

"His Lordship: You are satisfied he did not cause the accident by his own negligence?"

"The Foreman: Yes."

"His Lordship: Then I will put down the answer 'No.'"

"(4) If you answer 'Yes' to the last question, in what did his negligence consist? No answer.

"(5) If the plaintiff is entitled to recover, at what sum do you assess the compensation to be awarded? A. \$1,254."

The learned Chief Justice added to the answer to the second question the words "*as to bell*" and as the answer to the third "*No.*" (I italicise what is not in the original questions and answers.)

I do not think there is any reason to doubt that the learned Chief Justice obtained the meaning of the jury in respect of questions 2 and 3. *Gray v. Wabash R.R. Co.*, 35 O.L.R. 510, was not intended to revolutionise the practice which has prevailed for many years and to compel a trial Judge to send the jury back to their room and insert answers, explanations or qualifications,

with their own hand. In the *Gray* case, the majority of the Court thought that "the statement of the foreman, especially when given in the course of a conversation, in which there was no time to weigh his words, ought not to be taken as overriding the deliberate written verdict of the whole jury" (35 O.L.R. at pp. 514, 515)—in other words, that Mr. Justice Middleton, the trial Judge, had not obtained the real meaning of the jury. I was and am unable to see that such was the case: but, in any event, there is no contradiction here by oral communication by the foreman of what had been put into writing—what he says does not at all override the written statements.

That being so, we must take it that the jury have been able to find as proved only one act of negligence, i.e., the omission to ring the bell. It has, of course, been laid down more than once that for all purposes of the verdict the finding of one or more specific acts of negligence negatives all others which are charged.

Several witnesses say they did not hear the bell—of course that in itself would be of little or no consequence unless they go further and say that, had the bell rung, they would have heard it, or circumstances are made to appear which would justify the conclusion that the fact that they did not hear the bell shewed that the bell was not in fact rung.

In *Ellis v. Great Western R.W. Co.*, L.R. 9 C.P. 551, at p. 557, Bramwell, B., says: "The only thing relied on for that purpose" (i.e., to prove that warning was not given) "is the statement of the plaintiff that he did not hear it. That is no evidence that it was not done. It is consistent with two things—one that it was not given, the other that, though given, it was not heard. And when testimony is equally consistent with two things, it proves neither. This may seem a subtlety, but it is not. We all know what is done at nisi prius on such occasions. The question is, 'Had he called out, should you have heard?' If the answer is, 'I can't say,' then there is no evidence. If 'Yes,' there is. But 'I did not hear' is no evidence."

But, when this was cited in the House of Lords in the celebrated case of *Dublin Wicklow and Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155 (see p. 1161), Lord O'Hagan said (p. 1483): "It was urged, and the authority of an eminent Judge was vouched to sustain the suggestion, that proof of the want of

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hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me manifestly legal evidence, which may vary in its value and persuasiveness—which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but at all events cannot be withheld from the jury. And if this be so, there was here a conflict of testimony on which the jurymen, and they alone, were competent to pronounce.”

There is, however, at least one witness who “is not deaf” and who hears every bell that rings, and he did not hear the bell alleged by some witnesses to have been rung—the jury might, if they thought it credible, believe this witness, and they have done so. I do not think that, consistently with the rules so often laid down, we can interfere with this finding.

The sole question, then, is, whether the jury should have answered the third question as they did: and that is just another way of saying, “Should the learned Chief Justice not have nonsuited?”

It is argued that the plaintiff has put himself out of Court by swearing that he did not look after coming in front of the Wabash train. Had this been the case, we might have had to apply the cases cited on pp. 80, 81 of the report in *Tinsley v. Toronto R.W. Co.* (1908), 17 O.L.R. 74, modified perhaps by the decision in the Court of Appeal in *Wright v. Grand Trunk R.W. Co.* (1906), 12 O.L.R. 114. But we are not called upon so to do under the evidence here.

The plaintiff swears at one time definitely and specifically that when he passed the Wabash engine he looked both ways—it is true that at other times he says differently, but that is for the jury.

In *Scott v. Lake Erie and Detroit River R.W. Co.* (1900-01), unreported, the plaintiff brought his action against the railway company. When he was examined by his own counsel, he would give one account, when by the counsel for the defendants, another and a contradictory one, ending up with the latter. Mr. Justice Ferguson, the trial Judge, nonsuited; but this was re-

versed by the Chancery Divisional Court, Boyd, C., and Robertson, J.—Meredith, J., dissenting. A new trial was ordered at the expense of the defendants. An appeal to the Court of Appeal was dismissed, as was an appeal to the Supreme Court of Canada. The facts of this case will be found in Cases in the Supreme Court of Canada, vol. 210, 1901, in the General Library at Osgoode Hall.

It cannot, consistently with this decision, be held that all the statements of the witness are not to be submitted to the jury—or that the jury must necessarily take either view of their effect.

The jury believing that the plaintiff took all proper care, their answer would be justified.

The fact that the plaintiff began to run (if he did) does not necessarily connote negligence—that again is for the jury.

I would dismiss the appeal with costs.

LENNOX, J.:—The action was tried by the Chief Justice of the King's Bench and a jury.

The claim against the Wabash Railroad Company was withdrawn from the jury, and judgment directed dismissing the action without costs.

[The learned Judge then set out the questions left to the jury and their answers, as above, and proceeded:]

The defendants the Grand Trunk Railway Company ask to have the judgment entered upon the findings of the jury set aside, and, alternatively, for a new trial.

The action could not properly have been withdrawn from the jury. There was evidence to go to the jury, and, in my opinion, evidence upon which ten reasonable men could answer the questions submitted in the manner above set out. The only question which, to my mind, is even reasonably open to argument is as to contributory negligence. Upon the evidence adduced, a jury might perhaps reasonably conclude that the plaintiff could, by the exercise of reasonable care, have avoided the casualty, but they could, upon the evidence, at least as reasonably come to the opposite conclusion. Upon the question of looking out for danger at the only point at which looking was practically possible, when the plaintiff had emerged from the track occupied

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by the Wabash train—there was evidence both ways; and it was none the less evidence which the jury *must be* allowed to consider and pass upon, because it was all given by the same witness, the plaintiff himself. That, wisely or unwisely, he was trying to avoid a collision is the evidence of all the witnesses, and to accept the evidence of the company's witnesses as to haste—which I would think would be only accepted with reservations—is to emphasise this. That he passed rapidly in front of the stationary, or slowly receding, engine, does not indicate indifference to personal safety, but the contrary—to that extent it is the act of a prudent man—and, as neither Tatro, Duchene, Clark, nor any other witness said to have been in a position to know whether the plaintiff was looking or not, was questioned as to this matter, the jury may have inferred that the company were not anxious to have this point cleared up. And so it resulted that the plaintiff's evidence as to looking went to the jury without contradiction, and it was for the jury to determine which of the plaintiff's divergent statements they would accept, if either, just as it is for the jury to consider whether a witness tells the truth upon examination in chief, or upon cross-examination, or at all.

There was evidence upon which the jury, as reasonable men, could say that the plaintiff was not guilty of negligence but for which the injury would not have occurred. If he is to be believed—and the jury is to pronounce upon this—he had *no actual warning* of any kind when he passed in front of the Wabash engine; he could not see and he did not hear the approaching train; and, aside from the train crew, I do not remember that there is a witness who says he heard the bell until the engine was on or almost at Drouillard road; and, in the absence of this, it was not negligence for him to cross in front of the Wabash engine; at all events, this was not suggested as negligence at the trial or upon argument of the appeal.

As to the negligence of the company and how the accident occurred—including the question, as the learned Judge puts it, whether the engine ran the man down or the man ran into the engine—even if he did look, was the company's negligence in any case the cause of the injury? Or, even if the bell was not rung, yet, knowing of the danger, and having a chance to escape, did the plaintiff decide to plunge ahead and take chances? These are all questions upon which there was evidence to go to the jury,

and, upon conflicting testimony, to be weighed and determined in answering questions 1 and 2. Their answers are not necessarily final. It is again a question of whether ten reasonable men could answer as this jury have answered. I can see no reason why they could not. Neither do I find anything in the evidence, after a very careful perusal of it, that would indicate a mis-carriage of justice. Mr. McCarthy's argument, that much of the evidence for the plaintiff, perhaps all of it, being that neither whistle nor bell was sounded, or at all events heard or recollected, and the jury's finding being impliedly and legally a rejection of this evidence so far as it related to the sounding the whistle, the conclusion, based upon the evidence of the same witnesses, that the bell was not kept ringing, could not be accepted as the finding of intelligent and reasonable men, was ingenious, and, if technical, was somewhat captivating and presented with very great skill. I can conceive that a case might arise in which it would be unanswerable. The evidence shews that it is very far from being unanswerable in this case. The evidence as to the bell and whistle was not limited to the evidence for the plaintiff. The jury does not say that the bell was not rung at all, but that the defendant company "did not ring the bell continuously for a quarter of a mile, as required by the statute, in approaching and making this highway crossing." This is not the language used; but, taken with the specific instructions of the learned Chief Justice, there is no room whatever for doubt as to the meaning. As to the whistle, the jury may have left the question undetermined or may have been unable to agree, and, as reasonable men, it was open to them to accept the positive testimony of two or three Wabash employees—financially unconnected with the Grand Trunk. But of the thirteen witnesses called for the defence (an unfortunate number) there is not one, with the exception of the train crew and possibly Hutchinson, who says that he heard the bell until the train was practically upon the plaintiff. Edward Tatro, the first witness for the defence, whose attention was directed to the railway at the time, heard a whistle, but heard no bell. Duchene heard whistle and bell; but, as far as I can make out his evidence, he says that the bell and whistle were sounded and the collision occurred at about the same moment. Borland heard the whistle, but did not hear the bell.

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He too was in a position to hear, and was paying attention to the operation of the railway. Hutchinson was up the track a little way, and he says that the bell was ringing when it passed him. He says nothing as to the bell before or after this time. McGorlish and Stevens were at switches and heard no bell. They were east of the track, I think.

Rennie, fireman, and Butler, engineer, on the Wabash engine, the engine being immediately north of where the accident happened and partly on the roadway or just clear of it, say the bell was ringing *when it passed them*, but nothing about when it began to ring. This was just when the accident happened. Of course there is a difference between not hearing or not noticing and positive affirmative evidence, but it is sufficient, although not conclusive. It was all for the jury to consider. I am not of the opinion that the finding as to the bell, to be logical, involved a finding also that the whistle was not sounded. On the contrary, I think that the finding, just as it is, is cogent evidence that the jury took an intelligent and rational view of the evidence, taken as a whole, as to the alleged negligence of the defendant company. This disposes of the appeal.

The learned Chief Justice, in charging the jury, limited them to finding negligence upon two grounds only, namely, neglect to ring the bell or sound the whistle as required by the statute. This was a shunting engine, plying back and forward over a much frequented highway, and the requirement of the public as to speedy transit is not involved, as it would be in the case of freight and passenger trains.

The accident happened at a time of the evening when, as the railway employees would know, hordes of people would be crossing to their houses from the Ford factory.

There is a great deal of evidence to suggest that the bell, if rung, was not an effective warning to people using the highway. There is no evidence as to the character of the bell used except that it was intended to work automatically, was rung by hand when out of order, and was being rung by hand at the time of the accident. It is in evidence that it was not always rung. The Legislature meant a bell that would be heard on a highway a quarter of a mile away, and this having regard to prevailing conditions; and this I would think particularly applicable to

shunting engines operating over crowded thoroughfares, or where other noises are liable to drown a feeble tongue. Here the danger was greatly aggravated by the number of people using the highway, the volume of railway traffic, the running rights of the Wabash upon the same tracks, and the complicated switching and shunting operations over five tracks at a point which was practically a railway yard. Counsel for the plaintiff did not ask, but I should have asked, that the question of the company's negligence should be left at large, with instructions to the jury to assign negligence, if established, upon grounds other than or in addition to breach of the statutory duties referred to. The speed of a shunting engine approaching and crossing a highway of the character here might in itself be evidence of negligence; and the distance the train moved after notice of the danger, with brakes applied, might perhaps be evidence of negligence, in the circumstances of this case. It would be an unwarranted presumption on my part, with my comparatively limited experience, to speculate as to whether the learned and experienced Chief Justice would or would not have thought that there was evidence proper to be submitted to the jury upon any of these questions if his attention had been pointedly called to them. The submission was not made, and for the time being, at all events, the plaintiff is not prejudiced if my learned brothers reach the conclusion I have come to.

I think the appeal should be dismissed with costs.

MASTEN, J.:—The trial appears to me to present so many unsatisfactory features that I would have been glad to see a new trial directed; but I feel myself overborne by the reasoning which has been so effectively presented by the other members of the Court; and, accordingly, I reluctantly concur in the conclusion at which the majority have arrived.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

May 12.

HAMILTON GAS AND LIGHT CO. AND UNITED GAS AND FUEL CO.
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Damages—Construction of Conduit in City Street—Negligence—Injury to Gas-pipe—Escape of Gas—Breach of Duty to Restore—Continuance—Cause of Action—Vendee of Gas Company—Tort—Duty to Minimise Damages—Reduction of Damages on Appeal—Costs.

A gas company and the Provincial Hydro-Electric Department had each a right to place and maintain pipes and conduits in the public streets of a city. The company's pipes were laid there; those of the Department were being laid there by the defendant, under a contract with the Department, underneath the company's pipes; and, in the course of the work, through some want of care, one of the company's pipes was broken, and a large quantity of gas escaped, both before and after the sale by the company to another company of all its property. The two companies joined in an action against the defendant to recover damages for the loss of the gas:—*Held*, that the right to lay the pipes of the Department was subject to the duty to disturb the other pipes as little as reasonably could be, and to restore them, after disturbance; the whole cause of action did not arise when the break occurred; the duty was a continuing one; and both the plaintiffs were entitled to recover damages.

But the plaintiffs could not recover for losses which the exercise of ordinary care would have prevented—they owed the duty of taking all reasonable steps to mitigate the loss consequent upon the breach.

Jamal v. Moolla Dawood Sons & Co., [1916] A.C. 175, followed.

On appeal, the plaintiffs' damages were reduced from \$1,323.05 to \$684; and no costs of the appeal were allowed (MASTEN, J., dissenting as to costs).

Per MASTEN, J.:—The action was in tort; the rule as to minimising damages is applicable to cases of tort, as well as contract: *Lavere v. Smith's Falls Public Hospital* (1915), 35 O.L.R. 98, 115; *Bateman v. County of Middlesex* (1911-12), 24 O.L.R. 84, 87, 25 O.L.R. 137, 27 O.L.R. 122. The defendant should have the costs of the appeal, having substantially succeeded.

Judgment of the County Court of the County of Wentworth varied.

AN appeal by the defendant from the judgment of the Judge of the County Court of the County of Wentworth in favour of the plaintiffs in an action brought in that Court to recover damages for injury to the gas-pipes of the plaintiffs laid in the streets of the city of Hamilton, by the negligence of the defendant, a contractor for the construction of a conduit for the transmission of Hydro-Electric current. In the course of the defendant's work, it was alleged, he caused the plaintiffs' pipes to sag and leak. The judgment against the defendant was for \$1,323.05 and costs.

April 25. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. O'Heir, for the appellant, argued that he was not liable for loss sustained after the sale of the property in question by the one company of plaintiffs to the other. The cause

of action arose when the break occurred, and so the first owners could have no damages after their sale to the other company, because after that they sustained no loss; and the purchasers could claim nothing, because no wrong had been done to them. Neither should the plaintiffs be allowed damages for losses which the exercise of ordinary care on their part would have prevented. The plaintiffs knew of the large escape of gas as early as November, and they should have taken steps to stop the flow: Mayne on Damages, 7th ed., pp. 113, 185; Halsbury's Laws of England, vol. 10, para. 558 *et seq.* The damages allowed were in any event excessive.

S. F. Washington, K.C., for the plaintiffs, respondents, contended that there was not only liability for the break, but there was the duty on the part of the defendants of restoring the pipes, which was a duty which they would owe to successive owners until that work had been done. The damages were not excessive.

May 12. MEREDITH, C.J.C.P.:—I am in agreement with the County Court Judge in his view of the law applicable to the questions of liability dealt with by him in this case: I am not in agreement with him altogether on the question of damages.

Mr. O'Heir's well-put and logical argument regarding the question of liability for loss sustained after the sale of the property in question by the one company, of plaintiffs, to the other—whatever might be said of it if the case were one in which the injurer and the injured were altogether strangers in regard to the things out of which the injury arose—quite misses its mark in this case because of the particular rights and duties existing between the injured and the injurer in regard to such things.

The gas company and the Hydro-Electric Department had each a right to place and maintain pipes and conduits in the public street where the injury in question was done.

The gas company's pipes were laid there: and those of the Hydro-Electric Department were being laid there by the defendant under a contract with the Department; and were being so laid at a lower level than and underneath the pipes of the gas company.

The right so to lay the pipes or conduits of the Hydro-Electric Department was, therefore, subject to the duty to disturb the other pipes as little as reasonably could be, and to restore them,

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after disturbance, as nearly as could be, to the condition in which they were before interference with them.

Through some want of care, it is said, one of the pipes of the gas company was broken, and through that fracture a large quantity of gas escaped, both before and after the sale by the one company, of all its property, to the other: and damages have been awarded to each gas company for the loss thus caused, to the one for the loss before and to the other the loss after the sale.

Mr. O'Heir's contention that there can be no liability after the time of the sale is based upon the notion that the whole cause of action arose when the break occurred; and that the first owners can have no damages after their sale to the other company, because after that they sustained no loss, the loss was that of their purchasers; and that as to them there was no liability because no wrong done to them: but, as I have said, there was, in my opinion, the duty to restore the pipes, a duty which, as long as it lasted, was a duty owed to the owner for the time being of the pipes and of the gas wasted by reason of the continued neglect of that duty; a duty of the same character as if, instead of a broken pipe, it had been a length of pipe, or a plug removed, or a tap turned on, either negligently, or necessarily, in exercising the right to lay the pipes or conduits of the Department below those of the company. The price of the right to disturb the earlier laid pipes was, in part, the restoration of them when disturbed and leaving them intact.

But the plaintiffs cannot, nor can either, recover for losses which the exercise of ordinary care, under all the circumstances of the case, on their part, would have prevented.

The law in this respect is thus enunciated in one of the latest cases upon the subject: "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, and cannot claim as damages any sum which is due to his own neglect." *Jamal v. Moolla Dawood Sons & Co.*, [1916] A.C. 175. And the subject of the measure of damages has been much discussed and made plain, generally speaking, in such recent cases as: *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301; *British Westinghouse Electric and Manufacturing Co. Limited v. Underground*

Electric Railway Co. of London Limited, [1912] A.C. 673; and *Williams Brothers v. Ed. T. Agius Limited*, [1914] A.C. 510.

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The outstanding facts bearing upon this question are:—

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The defendant was only a contractor for the work of laying the pipes or conduits for the Department; his place of business was the city of New York; and his work on these pipes had ended for the working season.

According to the claim and evidence of the plaintiffs, late in November an enormous escape of gas began and continued through the months of December, January, and February, so great as to amount to about fifteen per cent. of the whole quantity made, that quantity being about eight million feet a month, for the three months.

Besides this, complaints flowed in to them of escaping gas in the street where the work had been done.

Unless the gas company took the unreasonable and inexcusable position that it was not a case of emergency for them—the emergency was that of the “other fellow” only—that it was really only the case, on their part, of a very large wholesale taker of their wares to be charged by them the highest retail prices, as they have charged him in computing their damages in this action, it must have seemed to them to be a case of great emergency calling for all effort, reasonably available to them, to stop the waste and the great danger it might cause.

Yet really little, very little in the circumstances, was done. The defendant’s foreman was notified of the leakage; but little, if anything, could be expected from that, as the work had ended for the season and the workmen had been disbanded. It could not have been thought that this man had much, if any, power to act then.

It was known that the leak was from the pipes in the trench which the defendant had opened; and I should have thought that, beginning at the end where the work ended, there could have been no great difficulty in finding the place of leakage by ordinary methods, in, at most, not many days, and the more so because the trench had been filled in only roughly.

The County Court Judge allowed the whole month of December, and one-third of the month of January, as the time during which full compensation, at retail rates, should be allowed for

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the escape of the gas, calculated at the quantity the plaintiffs said was lost; in addition to cost of search and repair.

In that he was quite too liberal in two respects—time and price—at least.

As to quantity, if the plaintiffs' statements of the actual quantity made and sold, and of the usual waste, be accurate, or nearly so, I agree with him in accepting the plaintiffs' rather than the defendant's contention as to the leakage being from the broken pipe which was eventually found; and for the leakage from which, for a reasonable length of time, liability is admitted by the defendant.

Thirteen days are said to have been spent in discovering the break, eleven in searching for it, and two in "investigating unsuccessfully;" and the County Court Judge thought the plaintiffs should be allowed about that length of time for searching and repair, in addition to the whole month of December for discovering that something was wrong and should be remedied by them; and this although the general complaints came in to them during the whole of the last week of December. In that, I am sure, the learned Judge erred. I cannot believe the company to have been so ill-managed, so very regardless of their own welfare, as to have allowed an extra loss in *waste* at the rate of a million feet of gas during the month to have happened without their knowledge, and indeed without knowledge of the cause of it, as well as the fact.

Then as to the price: it is the defendant's obligation to make good the loss, not to make good, in addition to that, the retail profit upon it, which would not have been earned: the loss did not prevent the supply of every demand for gas; it was only the additional cost of labour, if any, and of material, and wear and tear, if any, that made up the actual loss.

Three weeks seem to me to be ample, in time, and 85 cents enough in money, to allow in computing the plaintiffs' damages; and, so computed, with the addition of \$120 for labour and another length of pipe, the plaintiffs' damages are \$684: it was not enough for the plaintiffs to give evidence of the retail selling price of their gas only; the onus of proof of the loss was on them, and they knew that the retail price was not the best evidence of it; they knew that price included profit and additional cost to them for

‘reading’ meters and keeping and collecting many accounts, and probably other things; so they cannot complain at the price being put at 85 cents: and their charges for cost of finding and repairing the broken pipe are very high.

I would allow the appeal and reduce the damages to \$684: there should not be any order as to the costs of this appeal.

RIDDELL and LENNOX,* JJ., concurred.

MASTEN, J.:—This is an action for damages alleged to have been suffered by the plaintiffs, or one of them, in consequence of an interference by the defendant with the plaintiffs’ pipe-line, situate on a street in the city of Hamilton.

The defendant is a contractor, who was employed by the Hamilton branch of the Hydro-Electric Commission to put down certain wires necessary for their system, in the city of Hamilton. In the course of so doing, in pursuance of the statutory authority enjoyed by the Hydro-Electric System, the street was broken up and a trench dug to a depth considerably below the depth of the pipes of the plaintiffs, which had been there for many years previously.

Owing to the failure of the defendant’s workmen to proceed with adequate judgment and caution, the pipes of the plaintiff companies were not shored up or otherwise maintained in place, and the result was that they sagged, and a leak occurred. This leak continued from about the 1st December, 1913, until some time in the month of February, 1914, a period of about three months. Ultimately the leak was found and the pipe was repaired at a cost of \$122.45.

The claim is put forward by the plaintiffs, charging the defendant at retail prices with the gas which was lost and with \$122.45, cost of repairing the broken pipes.

The cause of action is, in my view, tort. The liability is admitted, and the sole question is the measure of damages. I agree with the view which has been expressed on that point by my Lord the Chief Justice, namely, that the plaintiffs cannot recover for

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*In the note of this case in 10 O.W.N. 246, it is said, at p. 247, that LENNOX, J., gave written reasons for his concurrence; but this appears to have been a mistake.

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losses which the exercise of ordinary care, under all the circumstances of the case, would have prevented. In addition to the cases referred to by my Lord (all of which are cases on contracts), I refer to the case of *Lavere v. Smith's Falls Public Hospital* (1915), 35 O.L.R. 98, at p. 115, and *Bateman v. County of Middlesex* (1911), 24 O.L.R. 84, at p. 87, affirmed 25 O.L.R. 137.* These cases afford authority for what on principle would seem to be the law, namely, that the rule in question is applicable to cases of tort, as well as to cases of contracts.

With respect to the period during which the plaintiffs can reasonably claim damages, the quantity of gas and the price of gas per thousand, I agree with the view expressed by my Lord, and have nothing to add.

For these reasons, I think that the appeal should be allowed and judgment should pass in favour of the United Gas and Fuel Company for the sum of \$684, as proposed by the Chief Justice, with costs down to the hearing.

With respect to the costs of this appeal, the defendant should, I think, be entitled to these, having succeeded substantially in reducing the judgment by about one-half.

Appeal allowed without costs; MASTEN, J., dissenting as to costs.

*Varied by the Court of Appeal, as to the quantum of damages, in *S.C.* (1912), 27 O.L.R. 122.

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May 12.

O'GRADY v. CITY OF TORONTO.

Mistake—Money Voluntarily Paid for Taxes under Mistake of Law—Right to Recover—Change in Law by University Act, 6 Edw. VII. ch. 55, sec. 18(O.)

By sec. 18 of the University Act, 1906, 6 Edw. VII. ch. 55 (O.), the property of the University of Toronto shall not be liable to taxation, but the interest of every lessee of its real property shall be liable to taxation. The plaintiff was the owner of a house in the city of Toronto, erected upon land owned by the University and leased for 39 years by a lease which was assigned to him in 1904. The change in the law effected by this enactment was not discovered by the plaintiff till 1914 or 1915, and the property continued to be assessed by the defendants, the city corporation, as theretofore, upon the basis of its actual value, and the plaintiff paid the taxes upon the assumption that he was liable, the defendants also having no knowledge of the change.

An action to recover a sum representing the difference between the taxes upon the fee and the taxes upon the leasehold for each of the years 1907 to 1913, was dismissed upon the ground that the payments were made voluntarily—both parties being ignorant of the change in the law.

Money paid under a mistake of law cannot be recovered.

Suggested exceptions considered and authorities referred to.

The law concerning which there was ignorance here must be regarded as part of the general law of the land.

Cushen v. City of Hamilton (1902), 4 O.L.R. 265, followed.

Durrant v. Ecclesiastical Commissioners (1880), 6 Q.B.D. 234, distinguished.

ACTION to recover sums paid for taxes to the defendants, the Corporation of the City of Toronto; upon a house and land, the house being the property of the plaintiff and the fee simple in the land being in the University of Toronto, who, on the 15th May, 1878, leased it for a term of 39 years, at an annual rental of \$150—the tenant paying the taxes. The lease was assigned to the plaintiff in 1904.

May 10. The action was tried by MIDDLETON, J., without a jury, at Toronto.

W. H. Irving, for the plaintiff.

Irving S. Fairty, for the defendants.

May 12. MIDDLETON, J.:—The plaintiff seeks to recover taxes paid to the City of Toronto upon a house erected upon certain lands owned by the University of Toronto and leased on the 15th May, 1878, for a term of 39 years, to be reckoned from the 1st October, 1877, at an annual rental of \$150; the tenant paying the taxes. The lease was assigned to the plaintiff in 1904.

After the making of this lease, the University Act, 1906 (6 Edw. VII. ch. 55 (O.)), was passed. By this statute, sec. 18, the

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property of the University shall not be liable to taxation, but the interest of every lessee and occupant of its real property shall be liable to taxation.

Neither the defendants nor the plaintiff had knowledge of this change in the law, and the property continued to be assessed as theretofore upon the basis of its actual value, and the plaintiff paid the taxes upon the assumption that he was liable to pay as before.

In 1914, or early in 1915, the mistake was discovered, and the defendants refunded to the plaintiff the difference between the tax upon the fee and the tax upon the leasehold interest for the year 1914, but refused to make any further concession. This action is now brought to recover the taxes paid for the years 1907 to 1913, but it is conceded that in any aspect of the case the Statute of Limitations would prevent a recovery save for the years 1910, 1911, 1912, and 1913.

I have come to the conclusion that the plaintiff must fail, for the payment was made voluntarily, the defendants assuming there was the right to demand the taxes, and the plaintiff assuming that there was the obligation to pay; both parties being ignorant of the statutory amendment to the law.

Mr. Irving relies largely upon the summary of law found in the 5th edition of Benjamin on Sale, pp. 113 and 114; but it is to be observed that what is there being discussed is not the right of action to recover back money voluntarily paid, but the power of the Court to relieve from a contract made in ignorance of the law; and, although there undoubtedly has been some tendency to relax the stringency of some of the older cases, Equity has never yet gone so far as to afford relief by enabling an action to be brought, directly or indirectly, to recover money paid under mistake of law. This is laid down without qualification by Pollock (Contracts), 5th ed., p. 437: "Money paid under a mistake of law cannot in any case be recovered;" and in a careful article by M. M. Bigelow, 1 L.Q.R. 298, where he says that money paid under mistake of law presents "the one permanent exception to the right of relief for mistake."

In *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149, Lord Westbury suggests an exception in cases where the ignorance is not of the general or ordinary law of the country but of some private right or *jus*.

In the first place, it is quite clear that the law concerning which there was ignorance here cannot be regarded as being other than part of the general law of the land. But, even if this were not so, the right to recover money paid is by no means clearly established by the dictum referred to. Pollock, in the work already referred to, controverts the existence of even this exception. In Halsbury's Laws of England, the rule is stated as being subject to qualification (vol. 21, para. 67); the exception suggested being cases in which there is some ground which makes it inequitable for the party who received the money to retain it. This must mean something more than the mere fact that the defendant has received and retains money which, save for the voluntary payment, he had no right to have. It is, I think, intended to be confined to cases in which there is some fraudulent conduct on the part of the defendant, or where he has actively misled the plaintiff, and cases in which there was confidential or fiduciary relationship between the parties. None of the cases cited justify the maintenance of this action.

In *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256, money was paid under the supposition that the payers were obliged to make payments under the terms of a supposed license. This supposition was erroneous. Warrington, J., says: "No authority has been cited, and I am satisfied that no authority can be produced, in support of the proposition that a voluntary payment made under a supposed legal liability creates in law any obligation at all."

In our own Courts, the case of *Cushen v. City of Hamilton* (1902), 4 O.L.R. 265, appears to be conclusive authority against the plaintiff. The municipality passed a by-law which was invalid, and on the strength of this it exacted license fees. Upon the by-law being quashed, those who had paid fees sought to recover the money paid. At the trial they succeeded; the trial Judge holding that the payments, under the circumstances disclosed, could not be regarded as voluntary; but on appeal this finding was reversed and the action dismissed; Osler, J.A., quoting from Dillon: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine, could not have been legally demanded or enforced."

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The case *Durrant v. Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234, strongly relied upon by Mr. Irving, is, as pointed out in *Trusts Corporation of Ontario v. City of Toronto* (1899), 30 O.R. 209, 213, a case not of mistake in law but of mistake in fact. The action therefore fails and must be dismissed with costs.

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May 16.

ANSELL V. BRADLEY.

Mortgage—Exercise of Power of Sale—Absence of Signature of Mortgagee—Fatal Defect—Sale Set aside—Costs—Set-off—Rights of Purchaser against Mortgagee.

Under a power of sale, in the statutory form, contained in a mortgage-deed, the mortgagee sold the land. The extension of the short form enabled the mortgagee to exercise the power after written notice to the mortgagor. A notice was served by the mortgagee upon the mortgagor; in the body of it the names of the mortgagor and mortgagee were mentioned, but it was not signed by the mortgagee, and there was nothing to shew that it was given by him, nor was it addressed to the mortgagor:—

Held, that the absence of the signature of the mortgagee was fatal: it is essential that the identity of the person giving the notice should in some way sufficiently appear in the notice itself, and that the notice should be a completed and not an obviously incomplete document.

Review of the authorities.

The sale based upon the defective notice was set aside in an action brought by the mortgagor against the mortgagee and the purchaser. The mortgagor was allowed his costs of the action against the mortgagee, to be set off *pro tanto* against the mortgage-debt; and the mortgagee was ordered to pay his co-defendant's costs and to refund the sale deposit.

ACTION to set aside a sale, by the defendant Bradley to the defendant Eckhardt, of land mortgaged by the plaintiff to the defendant Bradley, the sale purporting to be under the power contained in the mortgage-deed.

May 12. The action was tried by MIDDLETON, J., without a jury, at Toronto.

S. H. Bradford, K.C., for the plaintiff.

T. P. Galt, K.C., for the defendant Bradley.

G. H. Watson, K.C., for the defendant Eckhardt.

May 16. MIDDLETON, J.:—The plaintiff seeks to set aside an attempted exercise of the power of sale contained in a mortgage.

The mortgage is made under the provisions of the Land Titles Act, and bears date the 10th March, 1914, to secure the sum of

\$1,000, payable six months from date, without interest. The amount actually advanced was \$900, so that the mortgagor received \$100 for the loan of \$900 for six months; this somewhat onerous charge arising from the fact that the property hypothecated consisted of four small houses in the town of Cochrane, a town whose future was deemed so uncertain and insecure as not to render it an attractive field for the money-lender.

The mortgage contained a power of sale in the statutory form, providing that the mortgagee on default for one month may on one month's notice enter on and lease or sell the mortgaged land.

A fire occurred in a house upon some other property, in which the mortgagor resided, doing certain damage to this property. In respect of this fire \$710 was received from the insurance company, and this sum was paid on account of the mortgage, leaving a balance of \$290 to be paid.

In addition to this, the mortgagee claims to be entitled to \$56 for insurance premiums paid.

The mortgage was not met at maturity, 10th September, 1914; and, on the 31st October, 1914, more than one month's default then existing in payment of this balance, a document was served upon the plaintiff which is relied upon as constituting a sufficient notice under the power. No attention having been paid to this, the land was offered for sale, but withdrawn for want of bidders, and was subsequently again offered for sale, withdrawn, and finally sold to the defendant Eckhardt for \$1,900. The property is said to be worth \$4,000. At that time it was assessed for \$4,200, and it is now assessed for \$3,800. The houses were insured by Bradley, who is also the agent for the insurance company, for \$800 each, or \$3,200 in all.

The only substantial question is the validity of the notice already referred to, and the only defect in that notice calling for discussion is the absence of any signature.

The extension of the short form of mortgage enables the power of sale to be exercised "after giving written notice to the said mortgagor," etc.

The notice in question commences "I hereby require payment" etc., etc., and concludes with the further notice that unless payment is made by the 16th December, 1914, "I shall sell the property comprised in the said mortgage." In the body of the notice

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the mortgage is sufficiently recited, the names of the mortgagor and mortgagee and the date of the registration being given; but there is nothing in the notice itself to shew that it is given by the mortgagee, nor is it addressed to the mortgagor.

A duplicate of this notice was produced, signed by the mortgagee; and, no doubt, from the form of the notice served, his signature to the copy served was contemplated. It is suggested that at the foot of the endorsement the mortgagee's name appears, and this ought to be regarded as sufficient signature. Owing to some defect in the typewriting, only some letters of the signature even there appear; but I do not think the defect in the notice can be gotten over in this way.

Inasmuch as the notice was given to the plaintiff, I do not think that the absence of an address to her is fatal: *Doe dem. Matthewson v. Wrightman* (1801), 4 Esp. 5.

I have, however, come to the conclusion that the absence of the signature of the mortgagee is fatal. I do not mean by this that it is essential that the signature should appear at the foot or end of the notice, but I think it is essential that the identity of the person giving the notice should in some way sufficiently appear in the notice itself, and that the notice should be a completed and not an obviously incomplete document.

What is essential to constitute a sufficient notice is discussed in the case of *Fenwick v. Whitwam* (1901), 1 O.L.R. 24, and in the British Columbia case *Lockhart v. Yorkshire Guarantee and Securities Corporation* (1908), 14 B.C.R. 28: and, while I am in entire sympathy with the idea that a notice should not be regarded as a nullity or be held inoperative by reason of any minor irregularities, so long as it meets substantially the purpose for which it is required, yet the object of the statute in requiring a written notice by the mortgagee is obviously not met when the document served is one which does not in any way identify itself with the mortgagee or bind him. As well might it be held that an unsigned note or an unsigned cheque should be treated as a completed instrument.

The Court in British Columbia, I think, went far indeed in allowing the unsigned notice to be supplemented by the signed letter accompanying it; but even that falls far short of giving any validity to an unsigned notice standing alone.

The Privy Council in *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, refused to allow a letter drawing the attention of the defendants, who were entitled to notice of action, to an accident and inviting inspection, etc., to be treated as a notice of action; and there is danger where a statute or a contract requires a written notice to be given for the purpose of certainty, when the Court attempts to substitute for the clear and unambiguous notice contemplated something falling far short of it with the view of defeating what may be regarded as a technical or unmeritorious objection.

A sensible rule appears to be that laid down in *Eaton v. Supervisors of Manitowoc County* (1877), 42 Wis. 317, where it was held that a notice which the statute requires to be in writing is insufficient where it is not signed by the party giving the notice nor by any one for him, with the possible exception of a case in which the party giving the notice himself serves the notice; for his personal service may possibly then be regarded as sufficiently identifying him as the individual speaking by the written document. As at present advised, I would not agree with this suggested qualification, but would prefer the more clear-cut position taken in New York, where it was held in *Demelt v. Leonard* (1860), 19 How. Pr. 182, that an unsigned notice served was a memorandum only, and was a nullity when it was sought to be viewed as a notice.

All this is, of course, subject to the qualification based upon the familiar cases under the Statute of Frauds, that a signature may be found in the body of the document as well as at its foot or end, and to the further qualification, established at any rate since *The Queen v. Justices of Kent* (1873), L.R. 8 Q.B. 305, that a signature by an agent is sufficient.

I have found one case not entirely consistent with the view which I have formed. It is the Irish case of *Carleton v. Herbert* (1866), 14 W.R. 772, where it was held by a majority that where a lease gave the tenant the right to terminate at a certain time upon a notice in writing of his intention, and an unsigned notice was given by the tenant, which otherwise complied with the terms of the lease, and which referred to the person who gave the notice as being the tenant of the lands described, the notice was sufficient; Fitzgerald, J., dissenting, stating that, if his brothers had not

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been of the contrary opinion, he "should have thought it very plain . . . that this proviso meant a notice from the tenant, by name, expressing his intention to the landlord, by name, to deliver up the premises. I do not see how such an intention . . . is to be gathered from this notice."

But even that case is not enough for the defendants here, for there the tenant was sufficiently identified with the notice given. It purported to be from "the tenant." Here the notice is not said to be given by the mortgagee.

I think the sale must be set aside, and it must be declared that the notice in question is not a sufficient notice under the power of sale contained in the mortgage. The plaintiff should have his costs, and they may well be set off against the mortgage-debt *pro tanto*. The defendant Bradley should pay his co-defendant his costs of the action, and refund the sale deposit.

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[CLUTE, J.]

May 17.

KUUSISTO v. CITY OF PORT ARTHUR AND PUBLIC UTILITIES
COMMISSION OF PORT ARTHUR.

Street Railway—Injury to Vehicle on Highway—Railway Owned and Operated by Municipal Corporation—Negligence—Nuisance—Construction and Operation of Railway—Limitation of Time for Bringing Action—Municipal Act, sec. 460 (2)—Public Utilities Act, sec. 29—Public Authorities Protection Act, sec. 13—Ontario Railway Act, sec. 265—Notice of Claim—Sufficiency.

A city corporation owned and a commission created by the corporation operated a street railway upon the streets of a city; on the 3rd June, 1914, a car operated on the street railway ran into and injured the plaintiff's automobile, which had become stalled in crossing the track owing to the improper construction of the track and roadway; and the plaintiff brought this action, more than six months but less than a year after the occurrence, against the city corporation and the commission to recover damages for the injury:—

Held, upon the evidence, that the defendants were guilty of negligence which caused the injury, and that the plaintiff was not guilty of contributory negligence.

On the day of the injury, the plaintiff's solicitor wrote a letter, on behalf of the plaintiff, to the city corporation, making a claim for damages "for the smashing of" the plaintiff's "automobile by car number 46 on Cumberland street north this morning. I am writing you at this early date so that you may have notice of the claim to be in a position to institute the necessary inquiries." The defendants, after two weeks' delay, answered that there was no negligence, and they could not consider the claim:—

Held, that the notice was sufficient, if notice was necessary.

Held, also, that the various limitations of time for bringing an action—imposed by sec. 460 (2) of the Municipal Act, R.S.O. 1914, ch. 192; sec. 29 of the Public Utilities Act, R.S.O. 1914, ch. 204; and sec. 13 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89—had no application to this action.

In constructing the road a nuisance was created, and had ever since continued; this action was for damages for the injury sustained by reason of the improper construction and operation of the railway; and fell expressly within sec. 265 of the Ontario Railway Act, R.S.O. 1914, ch. 185.

Review of the authorities.

ACTION for damages for injury caused to the plaintiff's automobile by its being run into while stalled upon a highway by a car of the Port Arthur and Fort William Electric Railway, owned by the defendant city corporation and operated or managed by the defendant commission.

April 10 and 11. The action was tried by CLUTE, J., without a jury, at Port Arthur.

J. Reeve, for the plaintiff.

W. F. Langworthy, K.C., for the defendants.

May 17. CLUTE, J.:—Action for damages for injuries to the plaintiff's automobile, on the 3rd June, 1914, caused, as claimed by the plaintiff, by his automobile being run into by the defendants' car while the automobile was stalled upon Cumberland street at the intersection of Stevens street.

The plaintiff has a repair-shop and runs automobiles for hire in the city of Port Arthur; the Corporation of the City of Port Arthur owns the Port Arthur and Fort William Electric Railway, with its track on Cumberland street. Cumberland street is crossed by Stevens street.

On the day in question, the plaintiff, driving his own car with three other occupants, passed easterly down Cumberland street on the southerly or lake side of the track. On approaching Stevens street, he turned the car still further to the south to give him room to make the turn on Stevens street at the crossing. The front wheels of the car passed over the south rail, but were unable to pass over the north rail. Thereupon, the plaintiff attempting to increase the power of his motor, his car became stalled, and the defendants' car ran into and smashed the motor-car while it was so stalled.

The plaintiff charges that the injuries were occasioned by

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the negligence of the defendants: (a) in not having the space between the rails on the said tracks filled in so as to make the same safe for automobiles and other vehicles crossing them; (b) the lack of a proper system in handling its cars by the defendants in approaching the street crossing, especially in the unsafe condition of the one in question; (c) that the car in question was being run at a great speed and was not under proper or sufficient control; (d) the improper and negligent running of the car.

I find that the crossing formed by the junction of Cumberland and Stevens streets, at the time of the accident, did not have the space between the rails on the said track filled in so as to make the same reasonably safe for automobiles and other vehicles crossing them; but, on the contrary, there was no covering above the ties, nor was it filled in between the ties to the top of the ties at the crossing. I find that at the crossing there was a space unfilled, both between the rails and on the outside of the rails, of from four to five inches, and that this space never had been properly filled in, and that in this respect there was negligence in the construction. I find that the defendants' car was running, at the time of the collision, at from fifteen to eighteen miles an hour, and that this was a dangerous speed at the place and on the occasion in question. I further find that the motor-car would have passed over safely had the crossing been in a reasonably safe and proper condition. I find that the plaintiff was a competent, careful driver, and not guilty of contributory negligence on the occasion in question. I find that the defendants were guilty of negligence that caused the accident, and assess the damages at \$650.

It was hardly contended by the defendants' counsel that the crossing was in a safe condition. The principal defence was rested upon the want of sufficient notice, and that the action was brought too late.

The notice of action given by the plaintiff's solicitor on the 3rd June, 1914, is as follows:—

“To The Corporation of the City of Port Arthur.

“Gentlemen: I am instructed by Messrs. Kuusisto & Sunberg to claim damages from you for the smashing of their automobile by car number 46 on Cumberland street north this morning. I

am writing you at this early date so that you may have notice of the claim to be in a position to institute the necessary inquiries.

“Yours truly,

“John Reeve.”

To this the following reply was sent:—

“June 17th, 1914.

“John Reeve, Esq.,

“200 Arthur street, City.

“Dear Sir: In further reference to yours of June 3rd regarding claim of Kuusisto & Sunberg, we have had a report of this from the street railway department, and find that there was no negligence on the part of the employees, and therefore cannot consider your claim.

“Yours truly,

“J. J. Hackney, Commissioner Utilities.”

It is evident that the notice was sufficient to identify the time, place, and occasion, and the street car which it is complained caused the injury. The defendants evidently understood its full import, promptly made inquiry, took the position that they were not guilty of negligence, and refused settlement. In my opinion, the notice was sufficient under the statute, if notice be necessary.

The principal defence is that the action is not brought in time. The accident occurred on the 3rd June, 1914, and the writ was issued on the 24th April, 1915. It is contended (1) that, the action having been brought against the municipal corporation, it is barred by sec. 460 of the Municipal Act, R.S.O. 1914, ch. 192, sub-sec. 2 of which provides that no action shall be brought against a corporation for the recovery of damages occasioned by *such default* (that is, want of repair), whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained. (2) That the Public Utilities Act, R.S.O. 1914, ch. 204, applies to this case, and, the action not having been brought within six months, the claim is barred under sec. 29 of the Act, the Act having been passed in 1913. (3) That the Public Authorities Protection Act, R.S.O. 1914, ch. 89, also applies to this action, which is

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barred by sec. 13, which provides that no action, prosecution, or other proceeding shall lie against any person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute duty or authority, unless it is commenced within six months next after the act, etc., complained of, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

The plaintiff contends that these statutes have no application to the present case, and that the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 265, governs. The limitation provided in this section is that any action (subject to certain exceptions which do not affect the case) for damages sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases. Sub-section 3 declares that the company is not relieved from responsibility by inspection etc. "for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance or nonfeasance, of such company." This section is taken from the Railway Act of Canada, R.S.C. 1906, ch. 37, sec. 306.

In *Glynn v. City of Niagara Falls* (1913), 29 O.L.R. 517, the defendants, a municipal corporation, owned and operated an electric street lighting plant. The plaintiff, standing in the street, leant against one of the defendants' poles; the back of his head touched a chain suspended on that pole, and he received a shock which seriously injured him. The chain was connected by pulleys with the arc light hung in the middle of the street, and was there fastened, when not in use, by a ring at the end of the chain hooked on a spike in the pole. The jury found that the plaintiff was injured because something was wrong in the defendants' line, namely, that the chain was attached to the pole too near the ground; that the defendants had notice of the defect; that it might have been remedied; and that there was no want of care on the part of the plaintiff. It was held that so placing and keeping the chain was misfeasance, and that sec. 460 (2), doing away with the distinction between nonfeasance and misfeasance, was not retroactive and not applicable to the action,

which was begun before it came into force. Semble, "that the electric light danger is not a matter within the purview of the Municipal Act in the clauses relating to the liability to repair roads and bridges." Held, also, that the Public Authorities Protection Act of 1911, 1 Geo. V. ch. 22, sec. 17, does not apply to a municipal corporation; and the Public Utilities Act, 1913, 3 & 4 Geo. V. ch. 41, was not in force when the action was begun..

The judgment of the Chancellor was affirmed upon all points (1914), 31 O.L.R. 1, Riddell, J., observing (p. 10) that he is not to be taken to assent to the proposition that either of the Acts would apply in the present case, even if the negligence were after the commencement of the Act.

In my opinion, the three months' limit within which action must be brought, mentioned in sec. 460 of the Municipal Act, has no application to the present case.

Then with reference to the Public Utilities Act. Section 29 provides that "no action shall be brought against any person for anything done in pursuance of this Act, but within six months next after the act committed, or in case there is a continuation of damage, within one year after the original cause of action arose." This action is not brought for anything done in pursuance of the Act. In constructing the road a nuisance was created, which has continued ever since, and this action is for damages for the injury sustained by reason of such improper construction and operation of the railway, and falls, in my opinion, expressly within sec. 265 of the Railway Act, where the limitation for bringing the action is one year.

But it is said that, even if the Public Utilities Act does not apply, the Public Authorities Protection Act, ch. 89, sec. 13, does apply, and that, as this is an action instituted against "a person" for an act done in pursuance or execution or intended execution of a statute or in respect of neglect or default in the execution of such statute, duty or authority, the six months' limit would apply; and *Parker v. London County Council*, [1904] 2 K.B. 501, following *The Ydun*, [1899] P. 236, is relied on. In the *Parker* case it was held that the Public Authorities Protection Act, 1893, extends to county councils or other public authorities in their capacity as owners of a tramway acquired and worked by them under statutory powers, and an action to recover damages

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for injuries sustained by a passenger on one of their tramcars in consequence of the alleged negligence of their servants must therefore be commenced within six months of the act, neglect, or default complained of. This case was followed in *Lyles v. South-end-on-Sea Corporation*, [1905] 2 K.B. 1, where a municipal corporation constructed and worked an electric tramway under the authority conferred on them by an order made by the Light Railway Commissioners, in pursuance of the Light Railways Act, 1896, and having the force of a statute. A passenger, while travelling, was injured by the fracture of the conducting-rod, which fell upon him. In an action brought for damages it was held that the action was in substance founded on breach of the defendants' duty as a public authority under the Light Railways order, and they were entitled to the protection given by the Public Authorities Protection Act, 1893; and that, as the action had not been brought within six months from the happening of the injury, it must fail, following the two cases referred to.

Are these authorities applicable to the present case? I think not.

By sec. 17, the Act shall not apply to a municipal corporation, and it was upon this ground that the Chancellor, in *Glynn v. City of Niagara Falls*, held that the Act did not apply to that case.

The wording of the English Act differs somewhat from our statute, but in substance I think they are the same, except that the Ontario Act expressly declares that it does not apply to a municipal corporation.

The short title to the Act is a key, I think, to its meaning and application. It is true that in sec. 13, where the limitation is mentioned, it is declared that no action, prosecution or other proceeding shall lie or be instituted against any person for any act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, unless it is commenced within six months next after the act, neglect or default complained of.

The heading to sec. 13 is, "Actions against Public Authorities," and the marginal note is, "An action against a person for any act done under public authority to be begun within six months." I do not find "Public Authorities" mentioned in the other sections of the Act.

In the *Ydun* case, the owners of a barque issued a writ against the defendants (the mayor, aldermen, and burgesses of the borough of Preston, constituted by statute the port and harbour authority for the port and harbour of Preston) for damages sustained by the grounding of their vessel. It was held by the Court of Appeal, affirming the decision of the President, that the defendants were acting in pursuance of their public duties, so that sec. 1 of the Public Authorities Protection Act, 1893, applied. The President delivered a considered judgment, pointing out ([1899] P. at p. 239) "that the language does not in terms refer to a municipal or public authority, the words only are 'any person,' and, limiting one's view to the enacting words of the Act, it is not easy to see why a railway company, for example, a corporation which certainly does acts in pursuance or execution of an Act of Parliament, is not included. This, clearly, however, is not what the Act means, and, as has been pointed out in the case of *Fielding v. Morley Corporation*, [1899] 1 Ch. 1, in the Court of Appeal, it must be gathered from the short title of the Act, 'The Public Authorities Protection Act, 1893,' that it is only public authorities that come within the purview of the Act. But the question is, Are the public acts of a public authority protected when it is acting in pursuance of trade or business which in private hands would be of a private character? . . . If Parliament decides that a public authority should be so authorised, if it confers on a municipality the right and duty to assume the functions of a trader, it clothes those functions with a public character, and makes them just as much public duties of a public authority as those for the performance of which that authority was created."

It is not necessary to limit one's views to the words of a particular section. The title is now to be read as forming part of the enactment; as was said by Lindley, M.R., in *Fielding v. Morley Corporation*, [1899] 1 Ch. at p. 3: "I read the title advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament." And Romer, L.J., in *Jeremiah Ambler & Sons Limited v. Bradford Corporation*, [1902] 2 Ch. 585, at p. 594, said that "in construing the Act the Court may and ought to look to the general scope of the Act as expressed

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in its title." And Kekewich, J., in *Attorney-General v. Margate Pier and Harbour Co.*, [1900] 1 Ch. 749, at p. 752, held that the title was of supreme importance in indicating the intention of the Legislature and the object aimed at in passing the Act. And, per A. L. Smith, M.R., in *Milford Docks Co. v. Milford Haven Urban District Council* (1901), 65 J.P. 483, at p. 484: "It shews that the persons whom the Act is intended to protect are public authorities, and public authorities only." "Although the language is wide," said Lindley, M.R., in the *Fielding* case ([1899] 1 Ch. at p. 4), "the key to the enactment is that it is intended, as the title shews, to protect public bodies from expense when they are unsuccessfully sued in respect of acts done, or omitted to be done, in the exercise of statutory powers or duties." And in *The Johannesburg*, [1907] P. 65, at p. 72, Sir Gorell Barnes, President, said: "I think it is clear that the Act relates to public authorities."

What did or did not constitute a public authority within the Act was settled in *Attorney-General v. Margate Pier and Harbour Co.* (*supra*), in which it was held that profit-seeking for particular individuals was the test: see Chartres' Public Authorities Protection Act, 1912, pp. 7 to 10.

Applying these authorities to the present case, I am of opinion that the Act does not apply. It has no application to a railway as such, and our Act excludes its application to a municipal corporation. Here the corporation is authorised to own the railway, and, the Act not applying to either the corporation or the railway as such, the fact that the two are included in the one corporate body cannot give it application where it does not apply to either.

The plaintiff is entitled to judgment for \$650 with costs of action.

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RE TOWNSHIP OF STAMFORD AND COUNTY OF WELLAND.

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Assessment and Taxes—Equalization of Assessments—Fixed Assessments of Properties in Minor Municipalities—Validation by Statute—Exemptions—Application to County Rates—Assessment Act, secs. 85-93, 233—Jurisdiction of County Court Judge.

By-laws having been passed by the councils of minor municipalities in the county of Welland fixing the assessments of the real property of companies at amounts less than their true values, the county council, for equalization purposes, adopted the fixed assessments, and one of the township corporations appealed from the action of the county council. All parties agreeing, the appeal was dealt with by the County Court Judge, who made the final equalization of the assessments, and ruled that, for equalization purposes, the actual value of all ratable property in each municipality, regardless of such fixed assessments, should be ascertained, and that the county rates should be levied ratably on the various municipalities in proportion to the aggregate value:—

Held, on appeal from this ruling, that the companies whose assessments were fixed were not assessable in respect of county rates beyond the amount leviable in respect of the fixed assessments, and that for all except school rate purposes the fixed assessments must be taken as the actual value of the properties; RIDDELL and MASTEN, JJ., dissenting.

Consideration of the provisions of the Municipal Act and the Assessment Act, and especially secs. 85 to 93 and sec. 233 of the latter.

Re Town of Sarnia and County of Lambton (1909), 1 O.W.N. 184, approved.

Per MEREDITH, C.J.C.P.:—The County Court Judge had no jurisdiction to interfere with the assessments.

APPEAL by the Municipal Corporations of the Townships of Stamford, Crowland, and Thorold, the Towns of Welland and Thorold, and the Village of Port Colborne, from an order of the Judge of the County Court of the County of Welland equalizing the assessments in the county for the year 1916.

The view upon which the County Court Judge acted in making the final equalization of the assessments, as authorised by sec. 87, sub-sec. 8, of the Assessment Act, R.S.O. 1914, ch. 195, was, that for equalization purposes the actual value of all ratable property in each minor municipality, regardless of fixed assessments under special by-laws and statutes, should be ascertained, and that the county rates should be levied ratably on the various municipalities in proportion to their aggregate value.

February 15 and 16. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Cur. adv. vult.

April 14. THE COURT directed that the appeal should be reheard by a Court of five Judges.

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April 25. The appeal was heard by MULOCK, C.J. Ex.,
MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

D. Inglis Grant, for the Corporation of the Township of Stamford, *H. S. White* and *J. F. Gross*, for the Corporations of the Townships of Crowland and Thorold and the Town of Welland, *T. F. Battle*, for the Corporation of the Town of Thorold, and *G. S. Macdonald*, for the Corporations of the Villages of Port Colborne and Humberstone and the Township of Humberstone, the appellants, contended that the companies enjoying such fixed assessments as here in question were not assessable for county rates beyond the amount leviable in respect of the fixed assessments, and that for all except school rate purposes the fixed assessments must be taken as the actual value of the properties in question: *In re Revell and County of Oxford* (1877), 42 U.C.R. 337; *Re Secord and County of Lincoln* (1864), 24 U.C.R. 142; *In re Township of Nottawasaga and County of Simcoe* (1902), 4 O.L.R. 1; *Re Town of Sarnia and County of Lambton* (1909), 1 O.W.N. 184. The powers of county valuers being the same as those of township assessors, and the latter being powerless to assess properties enjoying a fixed assessment for more than the amount of such fixed assessment, neither could the county valuers value it at a greater amount. If the order in appeal stood, the partial exemptions which had been granted by local municipalities would be abrogated in so far as county taxation was concerned, which would be contrary to the terms of sec. 233 of the Assessment Act. Besides this, the practical difficulties in the way of carrying into effect the present order of the county council were so great as to indicate that the Legislature could not have intended such an interpretation of the Assessment Act. Counsel also urged that, to the extent to which certain property had been made exempt from assessment by by-law of the local municipality, it was no longer "ratable property" within the meaning of secs. 85 to 93 of the Assessment Act. Counsel also argued that the learned County Court Judge had no right to hear the appeal to him. And they contended that the excess in values of the properties in question over their fixed assessments should be disregarded by the county valuers.

M. Brennan, for the Corporations of the Townships of Pelham and Wainfleet, *G. H. Pettit*, for the Corporations of the Township

of Bertie and Town of Bridgeburg, and *L. C. Raymond*, for the Corporation of the County of Welland, the respondents, contended that the judgment appealed from was right and should be affirmed. As to the contention of the appellants that the county valuers could not go beyond the fixed assessments, the powers of the valuers are different from those of the assessors, and it is quite within their province to go outside of the fixed assessment. The order in appeal does not contravene the provisions of sec. 233 of the Assessment Act; nor would there be any practical difficulty in the working out of its provisions. Counsel also contended that the properties in question remained to the full extent of their actual value "ratable property" for the purposes of county taxation under sec. 297 of the Municipal Act, R.S.O. 1914, ch. 192, and sec. 89 of the Assessment Act, and consequently the county when passing its equalizing by-law must consider actual values. Counsel also contended that the learned County Court Judge had jurisdiction to hear the appeal.

Grant and White, in reply.

May 22. MULOCK, C.J. Ex.:—This is an appeal from a ruling of the Judge of the County Court of the County of Welland, dealing with the equalization of assessments for county (other than school) rates.

The question involved in the appeal arises under the following circumstances. The Township of Stamford, and other minor municipalities in the County of Welland, passed certain by-laws fixing the assessment of the real properties of certain companies situate in the respective minor municipalities at amounts less than the present values of such properties, for the purpose of promoting the establishment by these companies of industries in such municipalities, and such by-laws were by legislation declared valid.

The respective assessors for the municipalities in question prepared assessment rolls setting forth therein in one column the amounts of such fixed assessments as indicating the total amounts at which they are assessed for all purposes except for school rates, and in another column the amounts at which they are assessed in respect of school rates. For equalization purposes, the county council adopted such fixed assessments, and the Township of

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Pelham appealed from this action of the county council. All parties agreeing, the appeal was dealt with by the County Court Judge, who made the final equalization of the assessments of the county, as authorised by what is now sec. 87, sub-sec. 8, of the Assessment Act.

The view of the learned Judge was, that, for equalization purposes, the actual value of all ratable property in each municipality, regardless of such fixed assessments, should be ascertained, and that the county rates should be levied ratably on the various municipalities in proportion to their aggregate value. The appeal is from this ruling, the appellants contending that the companies enjoying such fixed assessments are not assessable in respect of county rates beyond the amount leviable in respect of the fixed assessments, and that for all except school rate purposes the fixed assessments must be taken as the actual value of the properties in question.

During the argument reference was made to one of these by-laws, namely, that of the Township of Stamford, and the Act of the Legislature declaring the same valid, and counsel conceded that the other by-laws and legislation validating the same were of the like tenor and effect.

The real turning-point of this appeal must depend upon the effect of the by-laws in question and of the validating legislation. Take, therefore, the sample by-law, that of the Township of Stamford. It reads as follows:—

“BY-LAW No. 11.

“A by-law relating to the assessment and taxation of the property of the Ontario Power Company.

“Whereas the undertaking and the works of the Ontario Power Company are calculated to contribute materially to the prosperity and well-being of the ratepayers of the Municipality of the Township of Stamford, and it is expedient to grant the request of the said company to the council and fix the assessment of the property within the municipality as hereinafter set forth and the apportionment thereof as hereinafter set forth.

“Be it therefore enacted by the Municipal Council of the Township of Stamford, for itself, its successors and assigns, and it is hereby enacted, that the annual assessment of all the real

estate, property, franchise and effects of the Ontario Power Company, situate from time to time within the Municipality of the Township of Stamford, and used for the corporate purpose of the company, be and the same is hereby fixed at the sum of \$100,000 apportioned as follows, namely:—\$30,000 upon the gate houses," etc., "and \$70,000 upon the other property of the said company," etc., "in the said municipality for each and every year of the years 1904 to 1924 both years inclusive, and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of \$100,000 apportioned as aforesaid.

"And be it further enacted," etc. (This clause has no bearing on this appeal).

"And be it further enacted that this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorised by sufficient legislative or other authority to pass the same.

"Read a third time and passed the 10th day of October, 1904."

Subsequently the Ontario Legislature, by 5 Edw. VII. ch. 78, enacted as follows:—

"Whereas the Ontario Power Company, of Niagara Falls, has, by petition, represented that a certain by-law of the Corporation of the Township of Stamford, in the County of Welland, being by-law No. 11, and passed by the municipal council of the said township on the 10th day of October, 1904, should be confirmed and made in all respects legal and binding in accordance with the intent and meaning thereof; and whereas it is expedient to grant the prayer of the said petition:—

"Therefore His Majesty, by and with the advice," etc., "enacts as follows:—

"1. By-law No. 11 of the Municipal Corporation of the Township of Stamford, set forth as schedule 'A' to this Act, is legalised, confirmed and declared to be legal, valid and binding, notwithstanding anything in any Act contained to the contrary."

For the respondents it was argued that the limitation in this by-law of the assessment and taxation of the company in question

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must be construed as confined to assessment and taxation for the use and benefit of the township only, and did not apply to the assessment and taxation for the purpose of the county (other than school) rates.

The by-law is not, I think, open to such narrow construction. Its language appears to me quite plain. In effect it declares that the county assessment of the company's property is limited to a certain sum, and that the company shall not be liable for "taxation of any nature or kind whatsoever beyond" what would be leviable in respect of the fixed assessment. The township, through its officers, is the only body in the county having the right to make assessments in the township for taxation purposes, either on behalf of the township or county, and the limitation to the assessment of the company's property fixed by the by-law means whatever assessment the township had the right to make. Its assessment constitutes the sole basis for taxation either for township or county purposes. The assessment of property below its real value operated as exemption *pro tanto* from liability to taxation. The company is not ratable in respect of the exempted portion of the actual value of its property.

Notwithstanding such exemption, the learned County Court Judge held that for equalization purposes it was the duty of the county council to value the exempted properties at their actual value; and secs. 40, 85, and 86 of the Assessment Act were referred to by counsel in support of this view. Section 40, sub-sec. (1), declares that, "subject to the provisions of this section, land shall be assessed at its actual value," and this language is relied upon as justifying the learned Judge's ruling.

In my opinion, it has no application whatever to the valuation by county valuers for equalization purposes. It deals merely with the matter of individual assessment of land by the assessors for the purpose of fixing a basis for taxation of the owner in respect of the land. The object of valuation by county valuers for equalization purposes is to secure a just relation between the aggregate valuation of the realty of the various municipalities; and secs. 85 and 86 do not require the valuers to ascertain the actual value of the realty, but merely to determine relative values in order that each minor municipality may be required to bear its just proportion of the county rates.

In interpreting secs. 85 and 86, it should be borne in mind that they aim solely at securing, through the agency of the municipalities, ratable taxation in respect of taxable realty throughout the county.

As the excess in value of the property in question above its fixed assessment is exempt from assessment and taxation (always excepting school rates), county equalization as regards such exempted property is an empty form. If then the valuers were to disregard the fixed assessments and thus increase the aggregate township value, who is to pay the increased amount of county rates thus apportioned to the township? The respondents contend that the township which granted the fixed assessment should pay this additional amount. But it can only do so by collecting it from its ratepayers. In order to give effect to this argument it would thus be necessary to levy upon the ratepayers in the municipality, other than those enjoying fixed assessments, the amount of the county rate which such exempted ratepayers, but for the fixed assessment, would have been obliged to pay. What right has a municipality to levy upon a portion of its ratepayers for county purposes a rate (on the basis of the assessment) not levied against all other ratepayers in the county? There is nothing in the Act to warrant such penalising of some of the ratepayers of a particular municipality because its council, in the exercise of its statutory powers, has seen fit to grant fixed assessments.

Section 89 in effect declares that the county council, in apportioning a county rate amongst the different minor municipalities of the county, shall be governed by the principle that the county rate shall be assessed equally on the whole ratable property of the county. Section 4 of the Act declares that yearly rates shall be calculated at so much in the dollar "upon the total assessment of the municipality and shall be calculated and levied upon the whole of the assessment for real property, income and business or other assessments made under this Act." "Yearly rates" includes not only the township rates but the county rates, and, by sec. 4, they are leviable only upon ratable property, and, by sec. 3, are leviable upon the basis of the assessment, not upon the actual value; or, paraphrasing sec. 4, it says that the assessment upon which the taxes may be levied, and not the actual value, shall

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alone be considered in calculating and levying rates. Inasmuch then as the valuation by valuers under secs. 85 and 86 is for the purpose of raising funds by a system of taxation within the meaning of the Act, it is obvious that the Act does not contemplate a method of valuation which would bear no fruit.

The respondents' argument, if correct, might at times give rise to a further question. If the fixed assessment, being less than the actual value, were not binding as regards county rates, it would also follow that, if it were greater than the value, the owner would be entitled in regard to county rates to escape from such fixed assessment. That is, the county rate would be levied against him on the basis of the valuation of the county valuers, but against his neighbour on the basis of the assessment. This would be contrary to the Assessment Act, which declares that all rates payable in respect of taxable property must be levied on the basis of the assessment.

The solution of the question involved in this appeal is furnished by giving effect to the evident intention of the by-law and validating statute. The excess in values of the properties over their fixed assessments, being thereby exempt from assessment or taxation, should be disregarded by the county valuers, as are places of worship, school properties, municipal buildings, and other properties which are not ratable. No distinction can be drawn between exemption by general Act and exemption by municipal by-law given effect to by special statute. Properties exempt from assessment and taxation by the general Act are not valued by the county valuers for equalization purposes, and exempted values of the properties in question should in like manner be disregarded.

For these reasons, I find myself, with respect, unable to share in the interpretation placed by the learned County Court Judge upon the meaning of the Assessment Act in its relation to the matters involved in this appeal, which, I think, should be allowed with costs.

MEREDITH, C.J.C.P.:—This is an appeal from a ruling of a County Court Judge upon an appeal to him against some of the provisions of a by-law of a county council passed for the purpose of equalizing the valuations of real property within the county,

made by the various assessors of the different minor municipalities comprised in the county. Commonly such an appeal from a county council is made to a Board appointed by the Lieutenant-Governor in Council of the Province; the Board comprising the local County Court Judge and the local Sheriff, together with another County Court Judge chosen by the Lieutenant-Governor in Council; but, if none of the municipalities concerned desire such a Board, then the appeal is to the local County Court Judge alone; with a right of appeal, in either case, to this Court, upon any question of law or the construction of a statute.

No objection to the appeal against the by-law being so made, that appeal was heard by the County Court Judge alone; and the ruling in question made by him was, shortly stated, that exemptions from taxation made under the provisions of the Municipal Act do not apply to taxation for county purposes—a ruling of a startling character and one which I feel sure the County Court Judge would not have made if he had taken time for fuller consideration of its nature and effect; for the judicial temperament, speaking generally, does not seek, much rather avoids, startling effects, following the rule and injunction *stare decisis*.

A little inquiry would have made it plain that such a ruling was quite contrary to the interpretation which had been put upon the clauses of the Assessment Act under which the by-law was passed, everywhere and for upwards of half a century. The purposes and effect of the clauses could have been found to be explained in all the editions, from the first, of the work of the late Chief Justice Harrison upon Municipal Law, and of other authors, the basis of whose works was the work of the Chief Justice; and, if inquiry had been made in every county throughout the Province, of the County Court Judges, of the Wardens, or of any other of the county or minor municipal officers, familiar with the subject—as most of them are—inquiry whether exemptions from taxation made under the provisions of the Municipal Act were treated in their counties as inapplicable to taxation for county purposes, the answer in every instance but one would have been, “No, and we never heard it suggested before;” whilst in that one exception, the County of Lambton, it would have been, “No, it was tried here and signally failed:” see *Re Town of Sarnia and County of Lambton*, 1 O.W.N. 184: a reference which would

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have enabled him to obtain from his brother Judge of the County Court of a neighbouring county the full facts of the judgment of a full Board upon the very question, delivered by a County Court Judge of great experience, giving reasons, in accord with the general interpretation of the Act and the long unvarying practice under it to which I have alluded; conclusive reasons, as it seemed to me, for reaching a conclusion the opposite of that contained in the ruling here in question.

So, too, I have always hitherto thought, even a cursory glance through the statutes affecting the question—the Municipal Act and the Assessment Act—should have made it plain that the ruling of the Board in the *Lambton* case was right and that that in question was wrong. Under secs. 395 and 396 of the Municipal Act, absolute power to make the exemptions in question is given; and admittedly that power was duly exercised; and, besides that, in many, if not all, of the instances in question, the by-laws have been confirmed by direct legislative enactment. There is one, but only one, exception out of this power so to exempt certain property from taxation, an exception expressly and clearly made in the enactments relating to public schools, the exception being taxation for public school purposes; to which now the County Court Judge has added taxation for county purposes in the County of Welland; but the Legislature alone has such power. Then sec. 233 of the Assessment Act, the Act containing all the equalization for county taxation purposes legislation there is, provides, as plainly as words can, as it seems to me, that such equalization legislation shall not derogate from or affect such exemptions so given. Its words are: "This Act shall not affect the terms of any agreement made with a municipal corporation, or any by-law heretofore or hereafter passed by a municipal council under any other Act for fixing the assessment of any property, or for commuting or otherwise relating to municipal taxation. But . . . such fixed assessment, or commutation of taxes or exemption, shall be deemed to include any business assessment or other assessment and any taxes thereon. . . ."

I am obliged to say that it is not understandable to me how this plain injunction could be disregarded by any one aware of its existence.

I should not have deemed it needful to say another word upon the subject but for the support the ruling in appeal has received

here. Because of that, it may be my duty to refer to other matters which to my mind make it quite, indeed, equally, plain, that the ruling in question is wrong.

The reasons for, and the purposes of, the equalization of county valuations of real property within the county used to be very well known. The money needed for county purposes, which must be raised by taxation, is levied by the minor municipalities comprising the county, with, and forming part of, their own rate. This imposition should be made evenly; the basis of such even imposition is the total amount of the assessment made for the purpose of taxation in each minor municipality: quite fair and even, if there were but one assessor for all such municipalities, but uneven and unfair, if, intentionally or unintentionally, land of the same value be assessed at widely different values in different municipalities. All lands should be assessed at actual value, but they seldom are in rural municipalities, and the discrepancies between assessed and actual values in them have been, and possibly still are, in places very glaring; in villages and towns the narrow area, and the great needs, compel assessment at full value, with a high rate of taxation still necessary to raise the sum needed; in rural municipalities the needs are so much less, having regard to the vastly greater area of taxable property, that low assessment and low rates are often sufficient.

To remedy substantial injustice arising from different valuations in different municipalities of land of the same value, the equalization legislation was passed and is in force. But it is not for any such purposes as the assessment of each piece of land is: such assessment is the duty of the minor municipality, to be exercised with all the care, and subject to all the rights of appeal, afforded to the person assessed, as well as others, by the provisions of the Assessment Act applicable to such assessments. What the equalizers have to deal with is only the total amount of such assessments of real property, and it is only "the aggregate amount of such valuations" to which there is any power to add or from which to deduct "so much per cent.:" see sec. 85. The power to appoint valuers, and their duties and powers, makes this plain: that that which they have to ascertain is, not whether any individual has or has not been assessed or duly assessed, but is to ascertain whether the real property, and the real property generally only, has been under- or over-assessed anywhere in

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the county. They make tests here and there, inspecting and valuing only to the extent of from five to eight per cent. of the assessed real property, and their one valuation may be the guide binding upon the county council for ten years: see sec. 85. There is no power to deal with personal property, income, or business tax; the whole question is, whether the assessor has under- or over-valued land generally in his municipality for the purposes of taxation—not for statistical purposes.

There is not anywhere anything that gives the least encouragement to the notion that the valuers or county council can thus deal with any question of exemption, or any individual or separate case of under- or over-assessment; all concerned have the right to challenge any such assessment, but to do it only in a fair and honest way, by appeal against the assessment, upon which appeal the person whose assessment is found fault with has an opportunity to defend himself. The valuers' duties and powers are contained in and made very plain by sub-secs. (3) and (4) of sec. 85; if they find that the assessors' valuation nearly corresponds in the aggregate with the valuers' valuation, the assessment roll shall bind the county council. If they differ materially, a general percentage shall be added or deducted to bring the assessors' whole assessment up or down to the result of their tests, covering five or eight per cent. only of the assessed real property. Section 87 also makes plain the same thing; it is "the valuation of any municipality"—the whole valuation—that may be appealed against: so, too, as the increased percentage is to be added to "*the local assessment*," if the ruling in question is right, all the values of all land in the township, for taxation purposes, must be increased as the land in question is to ten times more than the value at which it is assessed: which is only one of the absurd results of the ruling: sec. 85, sub-sec. 4. But I need hardly pursue this feature of the case further.

Now let me deal shortly with the County Court Judge's reasons for his ruling. He seems to have been carried away by some notion that the granting of exemptions by one township was a gross wrong to the others, if the exemption applied to taxation for county purposes; that the exempting township was making money at the expense of the others. The following words used by him supply the key-note to all that he said and did: "What is the use in telling me that the other municipalities had

to submit?" But where is the injustice? What possible gain has the exempting township at the cost of any other townships or of the county? The only money benefit a township can get is the taxes it levies; and these exempted industries pay county taxes upon precisely the same assessment as that upon which they pay the township taxes. Instead of losing, the county directly, and the other townships through the county, gain, exactly as the exempting township does, on the fixed assessment and on the increased population and increased business which the industry brings; the property of which added population—lands, incomes, and other assessable property—all is taxed, and taxed alike for township and for county purposes. The property of the industrial corporation alone has exemption, and exemption which should apply alike to taxation for county and township purposes; for there is no benefit the one gets that the other does not; and it need hardly be added that the benefit which such concerns bring to the county are not confined to the exempting township or the county or very much wider fields; some of them are turning out munitions of war for a very useful, and a very widespread useful, purpose; others have helped and are helping in the work that has reduced the price of electric heat, light, and power, to less than one-half of that which even a short time ago prevailed.

If exemption had not been given, these industries, or most of them, in all probability, would not have come to the township, and, not so coming, the county would have lost all it now makes out of the fixed assessment, as well as the assessment of the lands, income, and other property of all the officers, workmen, and other employees of these industrial concerns, and all the business they bring to the county.

The purpose of the Legislature in giving power to municipalities so to induce manufacturing concerns to bring such industries as those in question to Canada, or to create them in this Province, was not for the benefit of the local municipality only, but was much more for the infinitely greater purpose of making the Province a manufacturing country as well as an agricultural one.

The question put in argument to the respondents: "What wrong is done, what inequality maintained, by continuing to

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treat such exemptions as those in question as applicable to county as well as township rates? remains unanswered; for I cannot think the suggestion that the county criminal law expenditure is increased without any compensation is really seriously meant. No one has said, and I am sure no one could say, that the officers and other employees of the companies in question cause any increase in such expenditure disproportionate to that of the other inhabitants of the county; and they pay their taxes just the same as other inhabitants, upon their houses and lands and upon their incomes; whilst the companies themselves, which cannot very well be lawbreakers, as to a great number of crimes, pay upon their fixed assessment a share of such expenditures; whilst also such a population indirectly increases assessable property in the businesses its needs bring. No one has, and no one can, give any reason for the County Court Judge's frame of mind made plain by the question he asked: "What is the use in telling me that the other municipalities had to submit?"

Another pertinent question asked more than once, but unanswered, is: If there be no exemption from the county rate in such a case as this, why is there in regard to other exempt property, such as municipal property, churches, public educational institutions, seminaries of learning, etc., etc.? Why not embrace all in the equalization proceedings? Why may not "equalizers" make some seminary, for instance, liable to taxation, even though on appeal against its assessment it has been adjudged exempt? And behind their backs? The only answer I can suggest is, that they are expressly exempted under secs. 5 etc. of the Assessment Act, while the institutions in question are not expressly exempted until you reach sec. 233; but then perhaps that tardiness is made up for by the fact that they are made exempt expressly and plainly by the Municipal Act also, and the others are not. I confess to some difficulty in taking the ruling very seriously.

From another point of view, the inevitable conclusion that the long-established practice was right, and that the ruling in question is wrong, must be reached. Throughout the case I have endeavoured to get a satisfactory answer to the question: What is the effect of the ruling? How is it to be carried out? It is very easy and very simple, in a double sense, to say, "Oh, you have only to add so much more to the amount the township must collect, and pay to the county." But, who is to pay it? And

why? That of course may not be of much concern to others, but it is to him who has to pay. To him these are the most important questions, for few things are more irritating and disquieting than an unjust tax, especially if not clearly authorised by law.

The logical conclusion from the ruling in question is: that these industrial concerns, not being exempt from county rate taxation, should pay it. But what power is there to enforce such payment? The township clerk is to calculate the rate required to meet the county lump sum requirement, and insert it in the roll; that is, in effect, add it to the township's requirements, to be levied upon the property taxable according to the township assessor's assessment. But, if it could in any manner be added to the company's taxation, could anything be more unjust, more contrary to even that which is called natural justice? On the faith of exemption from all taxation except for school purposes, and relying upon the plain words of the statute-law, as well as the unbroken practice throughout Ontario, these companies have come to the county of Welland and established industries at enormous expense, only to be tricked as to the county rate; and, what is even worse, taxed behind their backs without being given an opportunity anywhere or at any time to say a word in their own defence, although the Assessment Act makes the most careful provision for an appeal all the way up to this Court against any assessment; and makes the assessment of the assessors valid and binding upon all parties concerned, if not appealed against, or as finally left upon appeal.

Whilst, if the other ratepayers of the township are compelled to pay, the result is, if it could be, even more unjust; their property has already been assessed and equalized up to its full value, and it is surely enough for them to pay their own taxes without having saddled upon them those of their neighbours; and that behind their backs without any kind of opportunity to object. One must face the music; one must look the thing straight in the face; and, so looked at, the farmers of Stamford are, by this ruling, in such a manifestly unjust way, compelled to pay the taxes of these great industrial concerns, instead of making such concerns, in a lawful way, pay their own taxes.

The case would be entirely different if the county could divide its load of taxation according to the value of the whole property in each minor municipality; disregarding all exemptions of every

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kind; but that would be entirely a new thing, contrary to the policy of the law giving exemptions of various kinds; and would require machinery for the valuation by the county of all the property in each minor municipality, not merely for an equalization of the local assessments for the purpose of taxation. And in this connection I feel obliged to say that there might be better discrimination, in the argument of such a case, than there has been, regarding the assessors' duties, between those which are for the purposes of taxation and those which are for statistical purposes only.

One is surprised when a peace which has extended over half a century is suddenly attempted to be broken, but one has seldom far to go to find the envy or jealousy at the bottom of the attempt. Recently these appellants have been in successful litigation with other industrial concerns over the question whether such concerns were or were not exempt from taxation for public school purposes; in which litigation* the appellants were throughout upheld in their contention that there was no municipal power to exempt from public school taxes in this Province; as the ruling in its Courts had always been. It is but a short step from that recent litigation to questioning whether there may not be other taxes from which exemption cannot be given, and so on to this litigation about the county rate; but I should have thought the school taxation litigation would itself have proved the futility of others attempting to get something more in a like way; the school rate could not be relieved from, because the Public Schools Acts, in the plainest words possible, said that it should not, and only because of that; and, there being nothing anywhere, plainly, or otherwise, declaring that the county rate shall not be exempted, that litigation seems to me to be the strongest of reasons against making this experiment; though not strong enough to have prevented it.

I am altogether in favour of giving to the plain words of the enactments in question, regarding exemption from taxation of such industries as those in question, their plain meaning, and of following the unbroken practice of over a half a century in "equal-

*See *Re Ontario Power Co., of Niagara Falls and Township of Stamford* (1914), 30 O.L.R. 378, 50 S.C.R. 168, 196; *Township of Stamford v. Ontario Power Co. of Niagara Falls* (1915), 7 O.W.N. 646, 8 O.W.N. 241; *Ontario Power Co. of Niagara Falls v. Stamford Corporation*, [1916] 1 A.C. 529.

izing" for the purpose of the county rate; and, accordingly, would reverse the ruling in appeal and restore that of the county council.

The reargument of this case has developed two things not touched upon in the first argument: the one affecting the respondents' right to appeal to the County Court Judge; and the other relating to county taxation for public school purposes.

As the right to appeal in such a case as this exists by virtue of the provisions of sec. 87 of the Assessment Act only, there is no power to confer jurisdiction by consent; and so, unless this case is brought within its provisions, the County Court Judge was without jurisdiction and his ruling is quite ineffectual; and accordingly should be set aside. Then is this case one within the provisions of that section of the Act? It does not give an unlimited right of appeal; but, as would be expected, gives a right of appeal against any change made by the county council increasing or diminishing any assessment contained in the by-law appealed against, as well as against a refusal by the council to make any such increase or reduction; in other words, unless the council has done something, or has refused to do anything, changing the previous by-law in respect of the matter in appeal, there is no power in the County Court Judge to interfere and no right of appeal: all of which is quite reasonable and as it should be; there should be no right of appeal unless the council has refused to make a change sought, or has made a change whether sought or not. No change was made by, and no change was sought in, the county council, in respect of the assessments in question in this appeal, and so there was no power in the County Court Judge to interfere with them; assuming, for the purposes of this question, that there could otherwise have been any such power.

Then as to a county rate for public school purposes: assuming that there was no exemption from it, it need hardly be said that it, like the township rate, for public school purposes, should be rated against and collected from the institutions in question, as well as all other ratepayers, upon the value of their property assessed for school purposes—that is, its full value—all which could and should be done by the township clerk in making up the collectors' rolls; and here again is confirmation of the general practice hitherto and condemnation of the ruling in question; because this rate would be levied, upon full value, solely in obedience to the express provisions of the Public Schools enact-

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ment; and, there being no such provision affecting the county rate generally, but the plainest expressed provisions to the contrary—sec. 233 of the Assessment Act—it must be rated according to and levied upon the limited assessment. No difficulty of any character arises out of the provisions of sec. 92 of the Public Schools Act; for county as well as for township purposes the rate for school purposes, in the one as easily as in the other, can be levied on the actual value: whilst, if there were no exemption from county rates, there would be no need for any special provision preventing exemption from them.

It need hardly be added that a fixed assessment is a partial exemption from taxation.

I am still very firmly of opinion that the County Court Judge was altogether wrong, as well as being of opinion that he was without jurisdiction, in all that was done by him respecting the assessment of these industrial concerns.

LENNOX, J.:—The appeal is from the judgment of the learned Judge of the County Court of the County of Welland declaring that for the purpose of equalizing the whole assessment of the county “the true value of the ratable property in each municipality” is to be ascertained as nearly as possible, and including “in the aggregate value of each municipality the difference between the fixed assessment and the true value as thus ascertained.”

I can find nothing in the Assessment Act or the Municipal Act, or any other relevant enactment, that to my mind is definite, positive, or unequivocal as to legislative intention.

“Municipality,” as used in the Municipal Act, includes a county: sec. 2(l); in the Assessment Act it does not: sec. 2(k); and the Assessment Act, R.S.O. 1914, ch. 195, is, “An Act respecting Municipal Taxation.” This at once brings up the point that the power conferred upon the county council, whether exercised directly or indirectly, is not a power specifically either to assess or tax any property whatever in any municipality. Its functions are defined by secs. 85 to 93 inclusive, and, its powers being statutory and itself as statutory body, it cannot go beyond the provisions or manifest intent of the statute. The county has a limited revisory or corrective power, and nothing more. Short of mistakes or actual wrongdoing, it can do nothing but accept the rolls as finally revised, and apportion the total amount

required for county purposes ratably against the municipalities of the county according to the rolls. If the assessor of the Township of Stamford has *set down* the fixed assessments of the township at the sums fixed by the by-laws of the municipality and has *assessed* the other properties therein according to their actual values, or if this is the condition of the roll as finally revised, neither the county council, nor their valuers, nor the County Court Judge, nor a Board appointed under sec. 87, can alter the total amount of the roll by a single dollar. Property in any municipality having a valid fixed assessment, except as to school rates, is only *ratable* property of the municipality *pro tanto*, that is, to the extent of the fixed assessment. Beyond the fixed assessment, it is exempted property. Section 39 of the Public Schools Act, R.S.O. 1914, ch. 266, provides against the exemption of any property from liability for school rates of any kind. This is provided for in the directions to assessors contained in sec. 22 of the Assessment Act; and the assessor is, under sub-sec. (3), to set down in column 17 the total value of land so liable for school purposes. The county council has nothing whatever to do with this. Can it be said that an assessor or the Court of Revision, in setting out as the "total assessment" of the municipality the fixed assessments provided for by its by-laws and the actual values in all other cases, has not done precisely what the statute requires, and the only thing possible to be done according to law; and, if assessed and returned according to law, what right has a county council to disturb or alter it? The assessment becomes "a fixed assessment," and exemption for the surplus value results by one and the same ordinance, the by-law, and by the corporate entity in which the Legislature vests the exclusive power of assessment, as well for the levy of county as for the general local taxes of the municipality. What is done, if done at all, must be done in the statutory way. The basis of action is defined in sec. 85. It provides for valuers, and lays down the method of procedure by sub-sec. (1).

In a general sense, the valuers shall be under the direction of the county council, but it is only in a general sense. The matter is not left at large, and discretionary powers are not conferred upon either the valuers or council. The work they are to perform is to be of the same character as, but much more circumscribed than, the work allotted to the assessors. They

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shall only value in sections, and in no case shall they attempt to "exceed the powers possessed by assessors." As in many other instances, the language of the statute is not as definite as it might be. They are to value from five to eight per cent. of sectional portions of the real property of each municipality. The language, as a matter of mere words, is broad enough to include a valuation of lands of the Crown, land held for religious and educational purposes, and in fact exempted properties of every kind; but, as they are only to do what the assessors have done or ought to have done, and their work is primarily for comparison with the work of the assessors, and not to go beyond its range, an interpretation including the valuation of *anything outside ratable real property* cannot be supported. When they have done just what the statute prescribes, and neither less nor more, covering a part of the work to be done by the assessors—and in no case incorporating any valuation which the assessors, as the basis of county rate, had not power to make—they compare their aggregate valuations of *ratable* property with the corresponding aggregate valuations of *ratable* property upon the last revised assessment rolls; and, if they nearly correspond, the valuator, and afterwards the county council, shall accept the assessment roll as correct for the purposes of county valuation (equalization?). What the assessors, and the Court of Revision, should do in the first place, or what the valuator, if appointed, should do by way of correction, is, as I understand it, the limit of that which the county council, or, in case of appeal, a Judge, or Board, or this Court, may do by way of equalizing the rolls. Applying this, take, for illustration, the Artificial Abrasium Company of Thorold, with a fixed assessment of \$5,000 for all purposes. The man who carries the assessment roll for the township of Thorold does not assess this property for any purpose. This was done by by-law and the special Act exempting it from the operation of the Public Schools Act. (The recent decision of the Privy Council* does not affect the argument.) Mechanically entering these figures upon the roll—which he cannot vary up or down by a fraction of a cent—is not assessment or valuation. He can do this, he must do it, and he can do nothing more. What would the valuator have

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power to do—and it serves as an illustration for all other cases? Can they do what the assessor cannot do? The statute says they cannot do more; and the statute also says that their valuation must be adopted by the county council as the basis for equalization. I repeat that what the valuers are to do, and what they are empowered to do, is what the assessors ought to have done and have failed to do, and nothing else, and so down to the end of the chain—the county council, the Judge of the County Court, or the Board, and this Court. As to each and all it is a test as to whether the assessments have been made and the rolls finally revised according to law, not a re-assessment but a correction of what has been unlawfully done, and nothing more; what has been done according to law, and all that has been done according to law, must stand. Sub-section (3) of sec. 85, amongst other things, provides that “the said valuers shall compare their valuations with *the valuations* in the last revised assessment roll *made by the assessors* of the several municipalities within the county; and if upon such comparison it is found that the valuation of the county valuers nearly corresponds in the aggregate with the valuation upon the assessment roll of a municipality, the valuers *and afterwards the county council* shall accept the assessment roll as correct for the purposes of county valuation.”

A demagogue in the park of any city can win rounds of applause by a high-pitched declaration for universal assessment and an indiscriminate levy — whatever the auditors' mental reservations may be as to their own exceptional circumstances—but this is not the law. Broadly speaking, all land is to be assessed, and at its full value; and revenues are to be raised by the imposition of an equal rate. From various causes, however, the principle of universal and full value assessments has not been adopted. First, the Legislature itself, in sec. 5 of the Assessment Act, sets out a formidable list of properties and incomes wholly or partially exempt from taxation. Sometimes a municipality regards itself as unduly blessed by an exceptionally large proportion of governmental, scientific, educational, religious, and other properties and institutions of the non-taxable class, and has been heard to complain, but neither the municipality nor the county council can revise the list. In addition to these exemptions, directly created by the Legislature, it has delegated to the municipalities not only power to exempt certain properties and industries wholly

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or partially from assessment and taxation, except for school purposes, but has authorised as well the payment of bonuses, and the taxation of one class for the assistance of another. See as an instance of this the Municipal Act, R.S.O. 1914, ch. 192, sec. 396. By sub-sec. (e) a bonus may be by exemption or fixed assessment for periods of ten years at a time. The learned Judge says: "It has been recognised here that certain properties are exempt. Well, if they are exempted by the Legislature, then they are not rated; we cannot have them rated. It seems to me that there is a broad distinction between property that is exempt from taxation and property that is assessed by agreement between the municipality and owners." With great respect, I cannot quite see the difference, so far as the questions here involved are concerned. The Legislature gives the power to exempt wholly or partially. I see no distinction between the municipality exhausting its power and wholly exempting, or exercising its power *pro tanto* only by exempting the value beyond the fixed assessment. Nor do I perceive any practical difference between the Legislature granting exemption directly and granting it through its statutory agent, the municipal council.

The Legislature is presumed to intend what is fair; and it is argued that the method pursued by the learned Judge is necessary in order that the burden of the county rate shall fall equally upon the ratepayers of the whole county. This is a formidable argument, if based upon fact and justified by the statute. Leave the law out. Does what is done here work for fairness or equal burden? Not at all. Why should the municipalities which have done nothing have a large percentage of their county rate paid by reason of the energy and enterprise of their neighbours, and directly out of the pockets of the people who have been doing something? It did not seem to be disputed that, taking the fixed assessments as they are, the total assessments of the appellant municipalities are substantially in excess of what they would be if fixed assessment had not been resorted to and the industries not brought in. To this extent, and undoubtedly to an infinitely greater degree in other ways, every other municipality has been benefited. They are not content with this. What do they want? They want the appellant group of municipalities to pay taxes on about \$6,000,000 worth of property which is not and cannot be assessed and from which these municipalities cannot get one cent

of revenue. They want to compel Stamford to pay a county rate more than 100 per cent. higher and the appellant group a rate 35 per cent. or 40 per cent. higher than the other municipalities of the county; and this in the name of equality and equity.

I am now brought to the examination of the equalization in the light of another important canon, namely: statutes are, if possible, to be read and applied in a way to make them workable. How is the so-called equalization to be worked out to produce the basic condition of equality? It is quite clear that it cannot be. Keep in mind always that there can be no new assessment—no alteration of any assessment. The difference between assessment and rating is not always kept as clearly in view as it ought to be, even in the statute. Outside the appellant group, there appears to be only \$151,550 worth of exempted properties. Aside from the inclusion of exempted properties, the equalization is not complained of. The learned Judge says he has brought all other properties in the county up or down to the basis of actual values.

The county is equalized at.....	\$38,726,968
or exclusive of exemptions at.....	32,827,493
The Township of Stamford is equalized at..	8,722,716
or exclusive of exemptions at.....	4,420,576
The appellant municipalities are equalized at	22,033,412
or exclusive of exemptions at.....	16,285,477
The exemptions in appellant municipalities are equalized at.....	5,747,925
The total real property in the townships of Willoughby and Wainfleet and the villages of Fort Erie, Chippawa, and Humberstone are equalized at.....	5,492,596

The assessments are stationary. There is no possibility of compelling the partially exempted properties to pay upon anything beyond their fixed assessments. Independently of what is argued as equitable equalization, the industrially improved municipalities are already contributing to the county burden in larger proportion than they would have been called upon to do had they not fixed the assessments and so induced industrial development, attracted population, and secured a profitable home market.

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How does the proposed equalization work out? The total real property in the county that can by any method be made to pay a county tax for general county purposes is valued by the equalization at \$32,827,493; the rest is legally exempted and cannot be compelled to pay one dollar to a county rate. Less than one half of this, as shewn above, is in the appellant group of municipalities—call it one half in each group. It works to a lot of curious results. In round figures, the non-industrial half will pay a county rate based on \$16,000,000 of assessable property, which it has, and the industrial half a rate based upon a like sum under like conditions; but, in addition to this, the same ratepayers will have to go into their pockets again to pay a county rate on \$6,000,000 of legally exempted property—and, in the sense of ratable property non-existent, a sum greater than the total equalized valuation of the townships of Willoughby and Wainfleet and the villages of Fort Erie, Chippawa, and Humberstone combined. Instead of a practically equal percentage levy upon all the land in the county for county purposes, there will be ten different ratings in a county of fourteen municipalities, and for every dollar that a farmer in the non-industrial group pays towards county expenditure the farmers in Stamford will pay \$2.21. The Legislature of course can so regulate taxation if it so determines, even though it be to hamper the speedy development of the Province—if it would have this effect, as to which I have nothing to say. All I have to say is that I find no indication in the statutes of an intention to bring about this embarrassing, and to my mind, in the absence of a clear declaration, wholly unjust, condition of affairs. On the contrary, although, as I have said, the statutory provisions are in many respects concerning assessment and taxation not so explicit as they ought to be, the Legislature has declared in favour of allowing a measure of local autonomy for the “municipalities” in the matter of industrial exemptions and fixed assessments; and, where this is not to have effect to all intents, has been careful to say so—as, for instance, concerning school rates already referred to, and in a very notable way in the Local Improvement Act, R.S.O. 1914, ch. 193, secs. 47 and 48, and the Assessment Act, sec. 6. I have had the advantage of reading the judgment in the unreported *Sarnia* case,* pronounced by a Judge of exceptional judicial learning and

**Re Town of Sarnia and County of Lambton*, briefly noted 1 O.W.N. 184.

experience, and who, as a commissioner engaged in the last revision of the Ontario statutes, is peculiarly qualified to deal with questions of the character here under consideration.

I cannot think that the Legislature intended that fixed assessments should be disturbed for the purposes of general county rating.

The judgment in appeal should be reversed.

RIDDELL, J.:—An appeal from His Honour Judge Livingstone on an equalization by him, under the Assessment Act, of the townships, for county rate.

The whole difficulty arises from the fact that in some of the municipalities there are by-laws fixing the assessment of certain establishments; some of these by-laws having been validated by legislation, of which (1905) 5 Edw. VII. ch. 78 is a sample.

The learned County Court Judge held that it was the real and actual value of the land in each municipality that must be taken, and not the "fixed assessment" in each case. He has taken the assessment for school purposes as the actual value, and this is an appeal from his decision, under R.S.O. 1914, ch. 195, sec. 87 (12).

I think the decision is right.

It is an elementary rule in the interpretation of a statute that the words employed shall be given their usual meaning, unless there be some cogent reason to the contrary. The valuers, under sec. 85 (1), are to ascertain "the value" of "the real property within the county," and I can find nothing to indicate that any other than the usual and natural meaning is to be given to these words. They have the powers of the assessors in performing that duty, and the assessors are bound to find the "total actual value of the land"—sec. 22 (3), col. 15—*cf.* cols. 13 and 14—i.e., of each parcel of land.

The same result, I think, follows from the history of the legislation in this regard.

Before 1866, the provision for equalization was that of the Assessment Laws Consolidation of 1853, 16 Vict. ch. 182, sec. 32, which provided that the county council should examine the assessment rolls of the townships yearly to see whether the valuations bore a just relation to each other; the council was to increase or diminish the aggregate value of real property so as to

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produce such due relation. If the township had neglected to transmit in time a copy of its assessment roll, the council might proceed on the best information available. This provision was continued in the consolidation in 1859, C.S.U.C. ch. 55, sec. 70.

The statute received judicial interpretation in *Re Gibson and United Counties of Huron and Bruce* (1860), 20 U.C.R. 111. In that case, there was a bitter complaint that the new townships were excessively taxed, disproportionately high as compared with those which were older and wealthier. The allegation that the county council had not proceeded as directed by the statute was held not proved, and the Court thought that the council must be governed by its own judgment and could not have any rule laid down for it, in a matter which was in great measure a matter of opinion, particularly as, "although the person who framed the 70th and 71st classes of chapter 55, C.S.U.C., may have understood very clearly himself what he intended, he has not succeeded in making his meaning quite intelligible to others" (p. 120). This state of affairs was not satisfactory, and not long afterwards the Legislature intervened and introduced the modern system now exhibited in R.S.O. 1914, ch. 195, sec. 86.

The origin of this section is the Act of Canada (1866) 29 & 30 Vict. ch. 51, sec. 175. Before that time, there was no provision of this kind. Section 175 reads: "The council of every county may appoint two or more valuers within the county, for the purpose of valuing the real and personal property, whose duty it shall be to ascertain the value of the same as directed by the county council, but such valuers shall not exceed the powers possessed by assessors under this Act, and the valuation so made may be made the basis of equalization by the county council for a period not exceeding five years."

In 1873, by 36 Vict. ch. 48, sec. 210, a change was made, and the section reads: "The council of every county may appoint two or more valuers, for the purpose of valuing the real property within the county, whose duty it shall be to ascertain, in every fifth year at furthest, the value of the same in the manner directed by the county council; but such valuers shall not exceed the powers possessed by assessors; and the valuation so made shall be made the basis of equalization of the real property by the county council for a period not exceeding five years; and the equalization of personal property shall be as heretofore."

This appears unchanged in R.S.O. 1877, ch. 174, sec. 264; (1886) 46 Vict. ch. 18, sec. 271; R.S.O. 1887, ch. 184, sec. 269; (1892) 55 Vict. ch. 42, sec. 269 (1); but a sub-section was added, sec. 269 (2): "The county council may, at or before the expiration of the said period, extend the time for a term not exceeding five years further, and thereupon the valuation shall continue to be made the basis of equalization of the real property by the county council for such extended period." (This was introduced by 55 Vict. ch. 43, sec. 14). The statute R.S.O. 1897, ch. 223, sec. 310 (1) and (2), repeated these sub-sections, which are now R.S.O. 1914, ch. 195, sec. 85 (1) and (2). Section 85 (3) of the present Act comes from (1901) 1 Edw. VII. ch. 26, sec. 13; sec. 85 (4), from the same chapter, sec. 13 (a); and sec. 85 (5), from the same chapter, sec. 14.

From the first, the valuers were appointed "for the purpose of valuing" the property and with the duty "to ascertain the value of the same."

At the time of the Act of 1866, 29 & 30 Vict. ch. 51, the assessors were to find the "value of each parcel of real property" and "value of personal property" (29 & 30 Vict. ch. 53, sec. 21, cols. 11, 13, p. 298), as well as "amount of taxable income" (col. 12) and "total value and amount of real and personal property and taxable income" (col. 14). There were then no exemptions except the statutory exemptions, and no "fixed assessment." The "value" of the real property was its actual cash value as it would be appraised in payment of a just debt from a solvent debtor (sec. 30).

The first Assessment Act after Confederation was (1868-69) 32 Vict. ch. 36. That (sec. 21) directed the assessors to state, col. 12, "Value of each parcel of real property;" col. 13, "Total value of real property;" col. 14, "Value of personal property other than income;" col. 15, "Taxable income;" col. 16, "Total value of personal property and taxable income;" col. 17, "Total value of real and personal property and taxable income." This appears in R.S.O. 1877, ch. 180, sec. 12; R.S.O. 1887, ch. 193, sec. 14; R.S.O. 1897, ch. 224, sec. 13 (4). In 1904, 4 Edw. VII. ch. 23, sec. 22, directed, col. 13, "Actual value of the parcel of real property, exclusive of the buildings thereon;" col. 14, "Value of building;" col. 15, "Total actual value of the parcel of real

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property;" col. 16, "Total amount of taxable real property;" col. 17, "Total value of the parcel if liable for school rates only;" col. 18, "Total value of property exempt from taxation or liable for local improvements only."

The Assessment Amendment Act, 1913, 3 & 4 Geo. V. ch. 46, sec. 10, changed col. 14 so as to read "Value of buildings as determined under section 36." In the revision of 1914, the former sec. 36 became sec. 40. Column 15 now reads, "Total actual value of the land;" col. 16, "Total amount of taxable land;" col. 17, "Total value of the land if liable for school rates only;" col. 18, "Total value of land exempt from taxation or liable for local improvements only."

Accordingly, from the beginning, the assessor was to find and state the "value of each parcel of real property," "total actual value of the parcel of real property," "total actual value of the land"—terms quite synonymous. In 1866, the valuers appointed by the county council, while they had to ascertain the value of the property, had no other duties. There were no partial exemptions or fixed assessments to trouble them. Their duty was done when they ascertained and reported the value.

It is a general rule that "the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute:" *per* Lord Esher, M.R., in *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242. "It is the business of the Judges to find that the contemporary meaning of the terms used in the statute:" Craies' (Hardcastle) Statute Law, p. 81; *Aerated Bread Co. v. Gregg* (1873), L.R. 8 Q.B. 355, *per* Blackburn, J.

I cannot see the slightest reason for supposing that the Legislature intended the valuers in later years to act differently from those in earlier times, when there were no such fixed assessments.

Nor can any valid argument be based upon the fact that in some cases the by-laws are validated by statute. The effect of such legislation is simply to make the by-laws valid as though they had been valid *ab initio*—nothing further.

Nor can I see any hardship in holding as I do. Whether it is wise for any community to hold out a bonus to a proposed industry has been and will doubtless continue to be a matter of controversy. Adam Smith spoke on the question, and he has been

followed by thousands of political economists, real or supposed. Our Legislature has left it to the people of each municipality to decide for their municipality, and they do decide on grounds primarily and wholly properly self-regarding—as the by-law validated by 5 Edw. VII. ch. 78 puts it: “Whereas the undertaking and works of the . . . company are calculated to contribute materially to the prosperity and well-being of the ratepayers of the municipality of” S. That the undertaking may be of value to the County, Province, Dominion, Empire, or World, is an incident; that it may not be, is equally an incident. Some undertakings which might be thus bonused are considered a curse by thousands. All that is practically immaterial. The moving cause is legitimate self-interest. The ratepayers know that the cost of running the municipality may be increased, further police required, etc., etc., the extra expense may not be compensated by the extra taxes obtained, and the ratepayers may be confident that their extra outlay will be more than counterbalanced by the advantage to be derived from the new undertaking. That is for them. Our system of municipal home-rule allows them to decide for themselves.

But I can see no reason why the ratepayers of one municipality should be allowed to decide for other municipalities. For example, the expense connected with the administration of justice, the county gaol, etc., may be largely increased by the importation of men by the bonused industry, sometimes foreigners with little regard for our laws. Why should a rural municipality be compelled to pay an additional tax to the county because a town or other municipality may be benefited? The ratepayers may decide as they please for their own home municipality; they should be content with that.

The fact that such establishments must pay full school tax is not without some significance. The Judicial Committee have just decided* that such a by-law as is relied upon here is not effective to release them from that duty.

I proceed, however, on the words of the statute itself, and think the appeal should be dismissed with costs.

The above contains the conclusions at which I arrived on the former argument, and I see no reason to modify them in any way.

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*See *Ontario Power Co. of Niagara Falls v. Stamford Corporation*, [1916] 1 A.C. 592.

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There is, however, a point brought to our attention for the first time, in the second argument, which seems to me conclusive that the above opinion is right.

In the Public Schools Act, R.S.O. 1914, ch. 266, sec. 92, it is provided that the county shall levy "by an equal rate upon the taxable property of the whole county, according to the equalized assessments of the municipalities, a sum," etc., etc.

If in "the equalized assessments of the municipalities" the value of the lands may be taken at the amount fixed by the agreement by-law, it is plain that the land whose price is so fixed will escape payment of its just share of this school rate, which is expressly forbidden by sec. 39. To put it another way, in order that secs. 39 and 92 may be satisfied, it is necessary that the agreement by-law be disregarded in the equalization.

MASTEN, J.:—This is an appeal from the order or judgment of His Honour Judge Livingstone, Judge of the County Court of the County of Welland, dated the 7th December, 1915, whereby he fixed and equalized for purposes of county taxation the assessments of the several local municipalities of the county of Welland, pursuant to the provisions of sec. 87 of the Assessment Act, R.S.O. 1914, ch. 195.

Particulars of the by-law passed by the county council under the provisions of sec. 86 of the Assessment Act, which by-law was apparently in rehearing before the Court below, have not been furnished to us, but perhaps that is not of importance.

As part of the case before us on the appeal, there is filed a memorandum of facts, which I extract in part, for the purpose of indicating the exact nature of the question here arising:—

"Memorandum of facts as agreed upon by counsel for all parties for the purpose of this appeal.

"1. The fixed assessments referred to in the judgment are all made in pursuance of legal and valid by-laws of the local municipalities.

"2. Schedule A hereunto shews:—

"(1) The amount of fixed assessments in each local municipality as extracted from the several assessment rolls for the year 1914.

"(2) The value of all such property as assessed for school purposes.

"SCHEDULE A.

"TOWNSHIP OF CROWLAND	Fixed Assessment	Assessment for School purposes
"Bemis Bag Co.....	\$20,000	\$ 20,000
"Metals Chemicals.....	10,000	20,000
"Automatic Transportation Co. .	3,000	20,000
"United Motors.....	5,000	5,000
"Northern Steel Co.....	10,000	10,000
"Union Carbide.....	20,000	100,000
"W. G. Mixter.....	5,000	5,000
"John Deere.....	20,000	20,000
"Electric Metals Co.....	10,000	25,000
"Page Hersey.....	25,000	110,000
"Canadian Steel Foundries.....	10,000	175,000
"HUMBERSTONE TOWNSHIP.....		128,550"

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The fixed assessment and the assessment for school purposes of the other local municipalities are also set out in the memorandum, but the above extract is sufficient for present purposes to indicate the nature of the question that arises.

By his order, dated the 7th December, 1915, the learned County Court Judge, in para. 2, finds as follows: "2. In all cases of properties having fixed assessments, that is, assessments fixed by by-laws of the local municipality, I have endeavoured to ascertain the true values of such properties. For that purpose, by consent of all parties concerned, I have taken the several assessments for school purposes as the true value of those properties, and for the purpose of this equalization I have included in the aggregate valuation for each municipality the difference between the fixed assessment and the true value as thus ascertained."

Certain of the local municipalities of the county now appeal against the above finding, alleging that any property which enjoys a fixed assessment under authority of a local municipality cannot, for purposes of county taxation, be valued at a sum larger than such fixed assessment.

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In the argument before this Court, the discussion took a wide range, inviting an investigation generally of the Assessment Act and of the powers and duties of the assessors, with occasional side-glances at the Municipal Act.

It appears to me, however, that in truth the question is rather narrow, and falls to be determined principally, if not entirely, on a consideration of those provisions of the Assessment Act which have been expressly enacted to deal with this question of equalization of aggregate values between local municipalities.

It seems to me that this group of sections (85-93) forms a separate branch of the municipal and assessment code, and that the category of powers and duties therein set out is complete in itself, so that for the solution of the question now presented it is necessary to consider principally the scheme and purpose of these sections, and their language.

With these preliminary observations I turn to a consideration of the reasons urged in support of this appeal.

The first ground put forward is: that the powers of county valuers are the same as the powers of township assessors; that township assessors cannot assess properties enjoying a fixed assessment for more than the amount of such fixed assessment; and therefore that county valuers (their powers being assumed to be the same as those of assessors) cannot value it at more than the amount of the fixed assessment.

The powers and duties of assessors and of valuers are not identical. The purpose is different; the subject-matter is different. The object of assessment is to ascertain the tax payable by each individual ratepayer. The object of the valuation (five per cent. to eight per cent. of the real estate in each township) is to give the county council a basis to assist them in making the equalization necessary to produce a just relation between the different local municipalities.

The assessor assesses both real and personal property. The valuator values five to eight per cent. of the real property. County valuers might omit to inspect any of the properties which are subject to fixed assessment, and the question here before the Court would not arise on their report.

With respect to the phrase, "The valuers shall not exceed the powers possessed by assessors", I think this refers to their

right to demand information and to the authority conferred on assessors and the duties imposed on ratepayers under secs. 16 and 21 of the Assessment Act, and not to the scope of the valuator's report or to the nature of their duties.

But I do not think that in performing its equalizing functions the county council, or the County Court Judge on rehearing, is empowered to do anything in the nature of assessment, re-assessment, amendment, or re-adjustment of the assessment rolls of the local municipalities, and I am unable to see how a consideration of the powers of assessors, the forms and schedules of the assessment roll, its alteration or amendment, and other details relative to such assessment rolls, can aid us in determining the powers of the county council or the powers of the County Court Judge when performing his duties as equalizer. These equalizing sections seem to me, as I have said, to form a separate category of powers, with a purpose entirely different from assessment, and their interpretation must depend on the sections themselves and not upon the analogy of a different set of powers.

The second point urged in support of the appeal is, that, if the order now in appeal stands, the partial exemptions which have been granted by local municipalities will be abrogated in so far as county taxation is concerned; that this is contrary to the terms of sec. 233 of the Assessment Act; and that, apart from that statutory provision, the practical difficulties in the way of carrying into effect the present order of the county council are so great as to indicate that the Legislature could not have intended such an interpretation of the Assessment Act.

I am not impressed with this view. It appears to me that the order now in appeal does not contravene sec. 233 of the Assessment Act, and that from a practical standpoint the matter works itself out without complication.

It is to be borne in mind that the county council, in connection with equalization of values and collections of county taxes, performs two separate functions. Referring to the case now in appeal as a concrete example, the first act was when, in 1915, it passed an equalizing by-law under sec. 86.

This is to a considerable extent a judicial function, and I shall hereafter refer at more length to the powers and duties which the statute prescribes in respect to such quasi-judicial functions of the county council.

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The second of these functions will be performed by the County Council of Welland when, pursuant to the statute, it will in 1916 perform the following executive acts: (a) it will ascertain the total sum required by it to pay all debts of the corporation, whether of principal or interest, falling due within the year; (b) apportion such sum among the various local municipalities of the county, and pass a by-law directing what portion shall be levied in each; (c) certify to the clerk of each local municipality the total amount which has been so directed to be levied for the then current year. The clerk of the local municipality then calculates and inserts the sum in the collector's roll for the year (Assessment Act, sec. 92), and the township collector's duties are then governed by sec. 218 of the Assessment Act, which reads as follows: "218. All money collected for county purposes, or for any of the purposes mentioned in the next preceding section, shall be payable by the collector to the township, town or village treasurer, and by him to the county treasurer; and the corporation of the township, town or village shall be responsible therefor to the corporation of the county."

This makes it plain that the money does not become the money of the county, and it is not responsible for it until it is so paid over, and it confirms the view that the legal obligation is between the county and the local municipality, not between the county and the individual ratepayer. The county demands a lump sum, which the local municipality collects according to its own assessment roll, and the exempted property gets the benefit of its exemption. With the domestic operations of the local municipality the county authority is not concerned; it does not know or care from what individual ratepayers the lump sum due to it by the local municipality is collected. That is a matter left entirely in the hands of the local authorities.

If I am correct in this view, the argument of the appellants, founded on sec. 233, falls to the ground. There is no interference with the assessment roll of the local municipality. It remains untouched. The fixed assessment remains untouched. All that is done is that the county demands from Stamford a certain sum, from Welland another sum, and so from each local municipality, and the local municipality includes in the rate levied by it the sum so payable to the county authorities. The county authori-

ties themselves levy no rate directly, and the local assessment rolls remain unchanged.

The by-law and the agreement made in pursuance of it in effect provide for a special method of levying all taxes which the local municipality is obligated to raise, and I see no difference between the sum due by the township to the county authorities and a sum due by it to a contractor for building a bridge or repairing a road. The fact that a ratepayer in one township has to pay locally to his own township a higher rate for county purposes than a neighbouring ratepayer of the same county living in another township, is nothing to the point. It is merely the result of the exemption by-law, which the ratepayers of the township have themselves passed.

The third argument urged in support of the appeal is: that, to the extent to which certain property has by by-law of the local municipality been made exempt from assessment, it is no longer "ratable property" within the meaning of these sections (85-93).

This is based on sec. 297 of the Municipal Act, which provides that every municipality shall in each year assess and levy on the whole ratable property within the municipality a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year; and on sec. 89 of the Assessment Act, which provides as follows: "89. The council of a county, in apportioning a county rate among the different townships, towns and villages within the county, shall, in order that the same may be assessed equally on the whole ratable property of the county, make the assessment of property equalized in the preceding year the basis upon which the apportionment is made."

While it is true that the amount to be raised for county purposes is to be assessed equally on the whole ratable property of the county (sec. 89), yet the real property which enjoys a fixed assessment does not, I think, on that account become, even *pro tanto*, property not ratable. *Primâ facie*, the jurisdiction of any authority in levying or abating taxation is limited to its own revenues. If that is so, then the jurisdiction of each local municipality to exempt from taxation or to grant fixed assessment is limited to the taxes payable to such local municipality in its own right and for its own benefit, and no by-law passed by it can curtail or interfere with the right of the county to assess and

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levy against the actual value of the exempted property. See Municipal Act, sec. 297.

To reach this result it is necessary to establish that the lesser municipality is empowered by the statute to withdraw from the taxable area of the greater municipality (the county) such property as it chooses to include in exemption by-laws, the county itself having no voice in such withdrawal.

Such a view seems sufficiently startling to necessitate direct and explicit legislation to warrant it, but I can find no provision in the Act which limits the *primâ facie* right and duty of the county to tax on the basis of actual value all property which is not exempted either by the Assessment Act or by the act of the county itself, and I think that the properties mentioned in the exemption by-laws and agreements of local municipalities remain, to the full extent of their actual value, ratable property for the purposes of county taxation under sec. 297 of the Municipal Act and sec. 89 of the Assessment Act; consequently, that the county, when acting under those sections, and when passing its equalizing by-law, must consider actual values and ascertain the lump sum to be apportioned to the municipality accordingly, while the local municipality raises such sum, having regard to the exemptions which it has itself granted.

I turn now to the positive considerations which determine my mind to the conclusion that this appeal should be dismissed. It seems to me that the whole question resolves itself into an ascertainment of the powers and duties of the county council when it passes the equalization by-law (sec. 86) and the powers of the County Court Judge when dealing with the same subject on a rehearing.

The mischief or defect which existed before the law in question was passed is first to be considered, when addressing one's mind broadly to the purpose and scope of these sections. On this point I refer to the statements which my Lord the Chief Justice of the Common Pleas and my brother Lennox have, out of the fullness of their experience, set out in their judgments, and to which I have nothing to add. It appears that certain local municipalities had taken advantage of others by unwarrantably lowering their assessments. Such lowering, being general, did not affect the ratepayers of the local municipality *inter se*, but for

purposes of county taxation it resulted in an unjust relation between the aggregate assessment of the various local municipalities.

The statute in question was passed to put it out of the power of these local municipalities to continue that practice. The key-note of the enactment is an equalization fixed by an outside authority, and with which no local municipality can interfere.

If the local municipality can, by passing an exemption by-law granting a fixed assessment, withdraw from the consideration of the equalizing authority one property, it can withdraw two, and if two then three, and so on, until it has so withdrawn all the assessable property in the township, and the equalizing authority, on the appellants' contention, would be powerless to interfere, but is bound to "equalize" on the basis of the exemption by-law. Such a result would be destructive of the fundamental purpose of the Act and might reinstate in full force the evil originally complained of.

Again, looked at as a whole, these sections provide for action by the equalizing authority founded on *its opinion* of what is necessary to produce a just relation between the valuations in the various local municipalities.

It is an estimate, an opinion, a judgment of what is necessary to produce just relation, not a computation based on fixed legal rules or an addition of certain fixed and ascertained sums.

To lay down a hard and fast rule of law such as is contended for by the appellants would be to abolish all judgment and discretion on the part of the equalizing authority and to substitute an accountant's computation. That is not, I think, the spirit of this enactment.

Turning now to a consideration of the words of these sections of the Assessment Act (85 to 93), I observe that four successive authorities are invested with duties and powers relative to equalization: (1) county valuers, sec. 85; (2) the county council, sec. 86; (3) the County Court Judge, or in the alternative a Court of three, as provided in sec. 87, sub-sec. 4; (4) a Divisional Court, sec. 87, sub-sec. 12.

An examination of the language of the sections in question and of the powers and duties ascribed by the words of the statute to each of these authorities aids, I think, in the solution of the

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question under consideration, and supports the conclusion at which I have arrived.

First, as to county valuator appointed under sec. 85. From the statute it appears that "it shall be their duty to ascertain the value of the real property within the county by inspecting and valuing from five to eight per cent. of the different parcels of land in different parts of each municipality in the county."

I extract the above from sub-secs. (1) and (3) of sec. 85.

By sub-sec. (5) of sec. 85, it is provided as follows: "(5) The valuator shall attest their report on the value of the real property within the county by oath or affirmation in regard to the property actually inspected and valued by them in the same manner as assessors are required to verify assessment rolls."

Paragraph 1 of the affidavit referred to in this sub-section (Form 7 in the schedule to the Act), being the affidavit to be sworn by an assessor, reads as follows: "1. I have, according to the best of my information and belief, set down in the above assessment roll all the real property liable to taxation situate in the municipality (or ward) of (as the case may be); and I have justly and truly assessed each of the parcels of real property so set down *at its actual value*."

The words of the statute which I have extracted as above, coupled with the affidavit just quoted, seem to me to make it plain that the duty which the statute imposes on the county valuator is to ascertain and report the actual value of the lands examined by them, and no words of mine can make plainer the duty so imposed.

As the valuation made by the county valuator is directed by the statute to be the basis of equalization for a period not exceeding five years, it also affords a strong indication of the rule to be adopted by the county council in passing the equalization by-law.

I therefore agree in and adopt the views expressed by my brother Riddell on this phase of the case, viz., that the value to be fixed by the county valuator is the true value and not the assessed value of the real property examined by them.

Second. Section 86 deals with the powers and duties of the county council, and contains, I think, in its directions to that body, the key-note of the question here in controversy. According to this section, the basis of action by the county council shall be:

(1) an examination by the council itself of the assessment rolls of the different townships, towns, and villages; (2) supplemented, if desired, by a valuation and report by county valuers acting under the direction of the county council; (3) but resting in the final analysis mainly on personal acquaintance by that highly representative body the county council itself with lands throughout the county.

Such being the basis or foundation, the rule or direction laid down by the section for the guidance of the council in action is as wide as words can make it, viz., to increase or decrease the aggregate valuation of each local municipality, *as far as in their opinion* is necessary, in order to produce a just relation between them (see sec. 86). Could words be used that confer a wider discretion? The only rule is, what will produce a just relation between the local municipalities, having regard to all the circumstances known to the members of the county council? A broad discretion to a representative body seems to me to be the gist of the section.

The Legislature has not attempted to instruct the council how they are to proceed in order to do equal justice. It has done the best it could in committing to them, in general terms, the duty of equalizing the assessments, so as to produce a just relation, but has necessarily left it to them as best they can to work out the problem. It is not for a Court of law to interfere as regards the reasonableness of the valuations and the conclusions come to on that point. Even if it were, there are various circumstances to be taken into consideration as bearing on a question of computation of which a Court has not the means of judging for want of that local knowledge which the members of the county council must be supposed to possess and doubtless do possess: *Re Gibson and United Counties of Huron and Bruce*, 20 U.C.R. 111. Only in so far as the Legislature has prescribed definite rules for the guidance of the municipal body in the discharge of its duty, and only in so far as it plainly and manifestly violates such rules, can the Court interfere.

The Legislature having thus conferred on the county council, as a body representative of every local municipality, such general discretion, how can this Court say that such discretion is to be limited by an imperative rule of law relative to fixed assessments

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or by the independent action of certain municipalities in granting fixed assessments without the concurrence and agreement of the other townships interested, unless the statute contains an express provision to that effect, which it does not?

But it is said, further, that the aggregate valuations cannot be brought into a just relation with one another except by giving full force and effect to the fixed assessments established by each local municipality, and that any other course would be unjust.

I am unable to appreciate the force of this argument. It seems to me that it is met by the consideration that unless the real property in each local municipality is set down at its real valuation for the purposes of county taxation, those local municipalities which have passed by-laws granting a fixed assessment would be indirectly imposing on their sister municipalities in the same county an increased rate of taxation. If I am right in this, it is both unjust and contrary to all the principles of municipal government that one municipality should impose taxation on another municipality outside its boundaries. It would not for a moment be suggested that the Township of Stamford could directly impose on the Township of Pelham an increased tax; and, if it cannot do so directly, how can it do so indirectly?

The result, in my view, is that, by sec. 86, the county council is given a broad discretion—so broad that it is entitled to take into its consideration the assessment rolls themselves; its own knowledge of values (see sec. 88); the report of the valuers, if any appointed; and thereupon to form its own opinion as to what is necessary to produce a just relation between the aggregate valuations of the different townships. I think that *primâ facie* the actual and true value of the real property should form the basis on which the equalizing valuation is made by the county council; yet I also think that the discretion conferred by the statute is broad enough to enable the county council to take into account the general benefit and burden to the county and to other local municipalities of the industries established in a particular township in consequence of a fixed assessment, and to give weight to that consideration when, for purposes of county taxation, it fixes the aggregate valuation of the real property for the local municipality where such fixed assessment exists.

Values are to be ascertained by the county valuers in the manner directed by the county council; it would be entirely within

the scope of the section for the county council to direct the valuers to report both the assessed value and the actual value of any particular properties examined by them, and generally, in the performance of their duties as valuers, to conform to such directions as may be deemed necessary by the county council, so that it—the county council—may be fully informed of all the facts and considerations which ought to be before it in passing the by-law provided for by sec. 86. The concluding sentence of sub-sec. 1 of sec. 85 does not tie the county council to a mere ministerial recording of the rolls reported to them by valuers; but, under sec. 86, the council is bound to exercise the discretion conferred upon it and to bring the aggregate valuation of the several local municipalities into a just relation with each other.

Third. The words of sec. 87 appear to contribute little toward the determination of the question in controversy.

That section provides for an appeal, or rather a rehearing, in case any party is dissatisfied with the equalization directed by the county council.

Lastly, sub-sec. 12 of sec. 87, under which this appeal is brought, limits the appeal to a question of law or the construction of a statute, and does not aid in the main inquiry.

The question here arising may, I think, be stated as follows:—

Under the Assessment Act, is the county council, when acting pursuant to sec. 86, and the County Court Judge, when acting pursuant to sec. 87, at liberty to ascertain and determine the aggregate valuations ascribable for purposes of county taxation to each local municipality at such amount as will, in the opinion of the county council or the Judge, bring the aggregate valuations of the various local municipalities into a just relation to each other?

Or is the county council and is the Judge bound to make the exemptions or fixed assessments theretofore granted by the local municipality to particular ratepayers, pursuant to sec. 396 of the Municipal Act, the basis of his valuation, no matter what opinion may be entertained as to whether this will result in a just relation between the different valuations?

In other words, is the authority and discretion conferred by secs. 86 and 87 limited or controlled by an imperative rule of law that lands subject to a fixed assessment *must* be valued for the

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purposes of equalization at the sum named in the exemption by-law of the local municipality? Or does the county council, or the Judge on rehearing, possess a discretion to consider the actual value of the partially exempted properties when fixing the aggregate valuation apportionable to each local municipality?

I think that such discretion is not taken away from the county council or from the Judge, and that the Legislature has throughout these sections (85-93) designedly used words of such broad import as to leave it in the power of the authorities named to have regard to these fixed assessments only to such limited extent as in their opinion may be necessary in order to produce a just relation between the aggregate valuations of the different local municipalities. I do not say that they are to be entirely disregarded. I think they form a proper element for consideration by the county council and by the County Court Judge, but not a governing or controlling basis.

For these reasons I am of opinion:—

(1) That for purposes of county taxation the aggregate valuation apportionable to each local municipality in the equalizing by-law is, *primâ facie*, to be based on actual values and not on fixed assessments.

(2) That the county council and the Judge on rehearing possess the widest discretion in doing what in their opinion is necessary to produce a just relation between the aggregate valuations of the various municipalities, and that with that discretion this Court cannot interfere except for positive breach of statutory requirements.

(3) That the order in appeal does not violate any principle of law or misconstrue the statute.

(4) That the appeal should be dismissed.

Appeal allowed; RIDDELL and MASTEN, JJ., dissenting.

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REX v. DUCKWORTH.

Criminal Law—Murder—Evidence—Depositions of Witnesses at Coroner's Inquest and Preliminary Investigation—Witnesses Called by Crown at Trial—Contradiction of Former Statements—Cross-examination by Crown Counsel of Witnesses as Adverse—Admissibility of Depositions Confined to Purpose of Discrediting Witnesses—Canada Evidence Act, secs. 9, 10, 11—Judge's Charge—Absence of Objection at Trial—Stated Case—Misdirection—Effect of—"Substantial Wrong or Miscarriage"—Criminal Code, sec. 1019—New Trial.

The prisoner, who admittedly shot and killed his brother-in-law, was tried on a charge of murder. The plea was that the shooting was accidental or done in self-defence. Three Crown witnesses who, at the coroner's inquest and at the preliminary investigation before a magistrate, had testified to facts which made against the defence, at the trial mainly contradicted their former testimony, and gave unsatisfactory evidence tending to exculpate the prisoner. Counsel for the Crown, treating them as adverse, cross-examined them, and read to them portions of their depositions before the coroner and magistrate, which they mainly either contradicted or did not altogether admit to be true. The depositions were put in, and in his charge to the jury the trial Judge referred to them. No objection to the charge was made by counsel for the prisoner before the verdict, which was "guilty," but, after the verdict and sentence, upon the application of counsel for the prisoner, a case was stated by the trial Judge for the opinion of the Court, the question submitted being, "Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them, given at the inquest, or at the preliminary investigation?"

Held, by CLUTE, RIDDELL, and MASTEN, JJ. (MEREDITH, C.J.C.P., and LENNOX, J., dissenting in the result), that the depositions taken on the former occasions were not before the jury as evidence of the facts, but must be confined in their effect to the discrediting of the witnesses who had proved adverse; that the fact that no objection to the charge was made at the trial was not a fatal obstacle to the success of an objection made later; that the trial Judge misdirected the jury by giving them to understand that, in determining the facts, they might consider what the witnesses had sworn previously; that the question asked should be answered in the affirmative; and, notwithstanding that there was other evidence upon which the jury could properly have based a verdict of "guilty," that there should be a new trial, "some substantial wrong or miscarriage" (Criminal Code, R.S.C. 1906, ch. 146, sec. 1019) having been occasioned on the trial.

Per MEREDITH, C.J.C.P., and LENNOX, J., that the trial Judge did not tell the jury—that which would be obviously erroneous—that the depositions, in themselves, were evidence: adverse witnesses having in part admitted the truth of their former testimony, and their contradiction of it, as far as it went, being of a very unsatisfactory character, that which the trial Judge did was to ask the jury which story they believed—and that he was obviously justified in doing; but, if that had not been so, as there were but two stories of the crime, the one told by all the witnesses at the earlier investigations, repeated by one of them at the trial, and strongly corroborated by the circumstantial evidence, and the other a new story unsatisfactorily told by some of these witnesses at the trial, there was no misdirection in saying to the jury that the case depended upon which of these stories they believed; and so the question should be answered in the negative and the conviction confirmed.

Per MEREDITH, C.J.C.P., that as to contradiction there is no difference between the case of an "adverse witness" and a witness called by the other party.

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Per LENNOX, J., that, if there had been misdirection, "no substantial wrong or miscarriage was thereby occasioned," and so the conviction could not be set aside or any new trial granted (sec. 1019, *supra*).

Sections 9, 10, and 11 of the Canada Evidence Act, R.S.C. 1906, ch. 145, considered.

Review of the authorities.

CROWN case reserved by KELLY, J., as follows:—

The accused, Thomas Duckworth, was tried before me at the Assizes held at the town of Orangeville in and for the county of Dufferin, on the 22nd and 23rd days of February, 1916, on an indictment whereby the said Thomas Duckworth was charged with the murder of one Harry Strutt on or about the 2nd day of November, 1915, and at the said trial the said Thomas Duckworth was found "guilty," and was by me sentenced to be hanged on the 12th day of May, 1916.

The said Harry Strutt was killed on the 2nd day of November, 1915, and on the evening of the same day an inquest was held before Dr. Berwick, a coroner in and for the county of Dufferin, as to the cause of the death of the said Harry Strutt, at which inquest Mrs. Nellie Strutt (wife of deceased), Mrs. Olive Duckworth (wife of the prisoner), and Hamilton Duckworth (brother of the prisoner), and others, gave evidence.

Shortly after the said 2nd day of November, 1915, the said Thomas Duckworth having been accused of the murder of the said Harry Strutt, and having been arrested, he was at a preliminary investigation committed for trial.

At the said preliminary investigation, the said Mrs. Harry Strutt, Mrs. Thomas Duckworth, and Hamilton Duckworth, or some of them, were examined as witnesses.

At the trial before me, the evidence of Mrs. Nellie Strutt, Hamilton Duckworth, and Olive Duckworth, was in several respects contradictory of what they had sworn to on these previous occasions, and the Crown counsel, in his examination of these witnesses, whose attitude was hostile, drew their attention to their evidence previously given, and read to them much of that evidence.

An application is now made to me for a reserved case on the ground of misdirection, in that "it was the duty of the learned trial Judge to instruct the jury that, while they could refuse to believe the evidence of any or all the witnesses called, they could

not substitute for the evidence so rejected any evidence which had not been sworn to before them, and bring in a verdict based on evidence given at the former trial, and that any such evidence must not weigh with them in arriving at their said verdict."

The question I now submit for the opinion of the Court is:—

Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them, given at the inquest, or at the preliminary investigation?

The evidence taken at the trial and my charge to the jury are made part of this case.

May 8. The case was heard by MEREDITH, C.J.C.P., CLUTE, RIDDELL, LENNOX, and MASTEN, JJ.

C. R. McKeown, K.C., for the prisoner, argued that there had been misdirection and nondirection by the trial Judge. The counsel for the Crown had been allowed in effect to place before the jury evidence taken at the inquest, by reading a large portion of such evidence before the questions were asked. This evidence could not have been allowed if put in as part of the Crown's case in the usual way. The Crown's witnesses were allowed by the trial Judge's discretion to be treated as hostile. Counsel stated that his objection was not that the evidence had been allowed in, but to the use that had been made of it. The trial Judge should have told the jury that the evidence taken before the coroner was inadmissible to prove the facts, and was receivable only for the purpose of discrediting these witnesses: Phipson on Evidence, 2nd ed., pp. 419, 420.

J. R. Cartwright, K.C., and *Edward Bayly*, K.C., for the Crown, contended that the most that could be said was that the whole of the evidence of these witnesses should be disregarded; and even without their testimony there was sufficient proof of guilt: *Rex v. Thompson* (1913), 24 Cox C.C. 43. As to the Judge's charge, if it were looked at as a whole, as it should be, no fault could be found with it: *Regina v. Garner* (1889), 6 Times L.R. 110. A new trial should not be granted unless a substantial wrong or miscarriage of justice would follow the refusal of one: *Eberts v. The King* (1912), 47 S.C.R. 1; Criminal Code, R.S.C. 1906, ch. 146, sec. 1019. And it was for the prisoner to establish that

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there would be such a substantial wrong: *Rex v. Romano* (1915), 24 Can. Crim. Cas. 30. Here, even if there had been misdirection or nondirection, no injustice had been done thereby.

May 22. CLUTE, J.:—The stated case sets forth that the accused, Thomas Duckworth, was tried before Kelly, J., at the Assizes at Orangeville on the 22nd and 23rd days of February, 1916, on an indictment charging him with the murder of Harry Strutt on the 2nd day of November, 1915, and at the trial the prisoner, Thomas Duckworth, was found "guilty," and sentenced to be hanged on the 12th May, 1916.

Harry Strutt was killed on the 2nd November, 1915, and on the evening of the same day an inquest was held before Coroner Berwick as to the cause of his death, at which inquest Mrs. Nellie Strutt, wife of the deceased, Mrs. Olive Duckworth, wife of the prisoner, and Hamilton Duckworth, brother of the prisoner, and others, gave evidence.

Shortly after the 2nd November, Thomas Duckworth, having been accused of the murder of Harry Strutt, and having been arrested, was at a preliminary investigation committed for trial.

At the trial before Kelly, J., the evidence of Mrs. Nellie Strutt, Hamilton Duckworth, and Olive Duckworth was in several respects contradictory of what they had sworn to on previous occasions, and the Crown counsel, in his examination of these witnesses, whose attitude was hostile, drew their attention to the evidence previously given at the inquest, and read to them much of that evidence.

An application was made to the trial Judge for a reserved case, on the ground of misdirection, in that "it was the duty of the learned trial Judge to instruct the jury that, while they could refuse to believe the evidence of any or all the witnesses called, they could not substitute for the evidence so rejected any evidence which had not been sworn to before them, and bring in a verdict based on evidence given at the former trial, and that any such evidence must not weigh with them in arriving at their said verdict." The question now submitted for the opinion of the Court is: Was there in the charge of the trial Judge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them,

given at the inquest, or at the preliminary investigation? The evidence taken at the trial and the charge are made part of the case.

The learned trial Judge stated in his charge that: "You must have noticed how very distinctly and positively witnesses have contradicted one another, and even contradicted themselves as between statements made by them on previous occasions and statements made by them to-day. Now, it will be for you to come to a conclusion on those statements, whether the particular witness has told the truth to-day, or told it on another occasion under oath. Personally, I am glad that the duty is not mine, and that, the facts being altogether for you, the jury relieves me from the responsibility of passing upon that phase of the case."

There is then a reference to some of the facts of the case as disclosed by the evidence, and the trial Judge proceeds: "Prisoner returns to his house; and then we get into the very heart of the contradictions. I am not going over the whole story—some witnesses have to-day told a different story—that which has been read to you—as having been sworn to by them on two previous occasions. There is the evidence of the expressions made use of by him when he came home, of his action in getting a gun in the room adjoining the kitchen (into which he had passed), putting cartridges or something, a witness says, into it, going up the stairs after saying they would know in a minute what he was going to do."

The learned Judge further says: "The accused, himself, says that he remained upstairs, after the shot was fired, for about five minutes; that then he went down, he took his wife and children to Smith's, and did not come back. Is that correct? Is there anything that you believe contradicts that account? Others have told different stories, notably Mrs. Pell, who details exactly how each conversation and occurrence happened. Whose story is right? Is the story of Mrs. Pell correct, that her brother was shot and fell back into her arms before Hamilton Duckworth left the window, and before there was any scuffle between the parties, or do you believe Hamilton Duckworth's story at either the inquest or the preliminary inquiry—I have forgotten which—is correct? He denies it to-day. The accused says he did not have a gun at all at that time."

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And again: "The defence counsel says that the shooting was purely accidental. Accidental in this sense at least, that it happened through an effort on the part of the accused to defend himself—to save himself from being shot. . . . If you believe the accused's story, that would be the solution of it. If, on the other hand, you believe the story of Mrs. Pell, or if you believe what these witnesses who have contradicted themselves in the box to-day said on the earlier investigations, you will have to consider whether or not prisoner's story is believable."

It is conceded that, the witnesses examined at the coroner's inquest and called by the Crown on the trial proving adverse, they were cross-examined by the Crown counsel, and in doing so the evidence pointing to the guilt of the prisoner was read to them. This they either contradicted or did not admit to be true; and, in order to shew that their evidence at the trial was in contradiction to what they had said at the coroner's inquest, the coroner was called, and the depositions of these witnesses were put in at the trial.

The evidence given by these witnesses at the inquest was very strong against the prisoner. Hamilton Duckworth was called at the trial by the Crown, but proving adverse was cross-examined, in part as follows:—

"Q. Did you, at the inquest, make the following statement: 'Harry Strutt and Mrs. Pell were upstairs with me. They were getting ready to leave.' Did you make that statement at the inquest? A. I do not know whether I did or not.

"Q. Will you say that you did not? A. Yes, I will say I did not. I do not know whether I did or not.

"Q. Is that your signature? (Shewing). A. Yes.

"Q. Do you say that you did or did not make a statement at the inquest as follows: 'Harry Strutt and Mrs. Pell were upstairs with me. They were getting ready to leave?' A. I do not know whether I did or not; because I was all excited that night; I did not know what I was saying.

"Q. Is that statement true or false? A. It is false.

"Q. Did you also say at the inquest: 'I was looking out of the window when I heard a shot fired in the room?' A. I was looking out of the window when I heard a scuffle; that is what I said.

"Q. No, 'I was looking out of the window when I heard a

shot fired in the room.' Did you make that statement at the inquest? A. I do not know whether I did or not.

"Q. Is that statement true if you did make it at the inquest? A. It must be false.

"Q. Did you also say at the inquest, 'Thomas Duckworth fired the shot?' A. I do not know whether I did or not.

"Q. If you made that statement was it true or false? A. Well, it must be false.

"Q. Did you make the statement at the inquest? A. I do not mind if I did or not.

"Q. Well, if you made it, is it true? A. No, it is not true.

"Q. To be fair with you, you also added to that, 'I did not see him fire the shot.' Now listen.- Did you say at the inquest held on the 2nd day of November last before the coroner, Dr. Berwick: 'When I heard the shot I looked and saw Thomas Duckworth with a gun in his hand?' A. I do not know what I said.

"Q. If you made the statement on the 2nd day of November last at the inquest, 'When I heard the shot I looked and saw Thomas Duckworth with a gun in his hand,' was that statement true or was it false? A. It was false if I did.

"Q. Do you know this gun that Tom had that morning? A. No, I know nothing about it."

Again: "Q. What did you say at the inquest? 'I saw Harry Strutt lying in the pantry just after the shot, lying against Mrs. Pell, his sister.' Now what do you say, sir? A. Well, that is not right.

"Q. That statement is not correct? A. No.

"Q. You made the statement, of course, at the inquest? A. I did not know what I was saying that night. I could not tell you.

"Q. Now, then, the very next statement after that: 'I saw Harry Strutt lying in the pantry just after the shot, lying against Mrs. Pell, his sister. I went to take the gun from Thomas Duckworth.' Now, was that true? A. No.

"Q. Did you say, at the inquest, 'Harry Strutt came to the top of the stairs and fell down?' A. I do not know what I said."

Again: "Q. Did you say at the inquest, 'No one had anything in his hands when a shot was fired except Thomas Duckworth?'

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You told us that to-day, to his Lordship, practically. What do you say now? A. Well, I did not say it.

"Q. You did not say it where? A. At the inquest. If I did it is wrong.

"Q. Did you see any smoke in the room just after the shooting? 'I saw smoke in the room just after the shooting.' A. Well, that is not right. I did not see nothing.

"Q. Except the scuffle? A. I seen the scuffle.

"His Lordship: Do you say it is not right—that you did not say it, or the statement is not right? Did you say it at the inquest? A. I do not mind whether I did or not.

"Mr. Agar: Did you make this statement, that you saw smoke in the room just after the shooting? A. I do not know whether I said it or did not. I do not mind. I was all excited at the time. I could not see smoke."

And again: "Q. You said, 'I was looking out of the window when I heard a shot fired.' Was that right? A. I cannot mind.

"Q. Is it right or wrong? You swore to it. You signed it. A. I guess it must be right if I signed it.

"Q. 'You saw Thomas Duckworth fire the shot? A. I did not see him fire the shot.' Now, is that right? A. It must be right.

"Q. What did you do when you heard the shot fired? 'A. I wheeled and grabbed the gun. Where was the gun? It was with Tom.' A. I did not say that. I am telling the truth now. I have come to my senses. They would not let me say that."

Nellie Strutt said, in part, as follows:—

"Q. Is that your signature? That is your signature to a statement made by you to the coroner, is it not, at the inquest? A. I guess so, I do not remember.

"Q. Well, you remember giving evidence at the inquest? A. Yes.

"Q. And do you remember that the coroner gave you the usual oath to a witness to tell the truth, do not you? A. I guess so.

"Q. And at that inquest you said this: 'I am the wife of Harry Strutt. Tom Duckworth went to town. When he came back he saw his furniture on the side of the road. He said he would put the law to Mr. Jordan. He went over to Mr. Erskine's to hire a horse. He went to the town, and he came back again

about dinner-time, about noon. He came into the house with a rush, took off his gloves, and threw them down, went into the next room and got his gun. He appeared to be very angry. It was a big rifle that held six or seven shells. It was his own rifle. His wife asked him what he was going to do with it. He said, "You will know in a minute." He flew up stairs. I heard him at the stove-pipes. In a few minutes I heard a shot. I went to the bottom of the stairs. I saw my brother and Mrs. Pell try to get the gun from Tom. I saw my husband tumble down the stairs.' Did you make that statement at the inquest? A. I do not know whether I did or not.

"Q. (Reads to 'about noon') That is true, is not it—these statements that I have read so far? A. I do not know whether they are or not.

"Q. Are they true up to that point? (No answer).

"Q. I will have to ask his Lordship to direct you to answer my question if you do not answer me. Are these questions up to that point in your depositions true or not? A. I do not know whether they are or not.

"Q. Were you not trying to tell the truth at the inquest? A. I do not know whether I was telling the truth or what I was telling. I was just that much upset that I did not know where I was standing.

"Q. And yet you signed it. A. I might have signed it. You have got to sign them any way; they will make you.

"Q. Did you say at the inquest before Dr. Berwick, the other day—yesterday I think—"Tom said that if Jordan or my husband took the furniture out of the house he would put an end to my husband?" Did you tell Dr. Berwick that at the inquest? A. I cannot remember whether I did or not.

"Q. Was that statement true if you did make it? A. I do not think it.

"Q. And is the other statement true: that, if you did say it to Dr. Berwick, he came in with a rush, took off his clothes, threw them down, into the next room and got his gun? Is that true? A. No, it is not. I did not know what I was saying that night.

"Q. Did you say at the inquest, 'Tom came downstairs with a rifle in his hand and went out?' I do not remember whether I did or not.

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"Q. Do you think that statement is true? A. No, I do not think so.

"Q. Were you beside your husband when he died? A. I do not remember; but I know he was lying on the floor.

"Q. Did you say at the inquest: 'I was beside my husband when he died. He took a long breath or two and then he died.' Did you say that at the inquest? A. I do not remember.

"Q. What do you say about it. Do you think that is true? A. I do not think it."

Mrs. Olive Duckworth, prisoner's wife, was also cross-examined as to her evidence at the inquest.

"Mr. Robinette: I submit that the evidence of the prisoner's wife given at the inquest—she was not warned in any way at all; she should never have been called in this Court. I submit her evidence at the inquest should not be given here.

"His Lordship: Evidence in regard to some statement to the coroner?

"Mr. Robinette: I take the objection that that cannot be given.

"His Lordship: I will note your objection, but I cannot agree with you unless you can shew me some authority I am not aware of."

From a perusal of the evidence it thus appears that witnesses who were examined before the coroner, were, at the trial, called by the Crown, and that, proving adverse during the course of the examination, they either contradicted evidence given by them before the coroner or denied that it was true in regard to very important evidence against the accused, and declined to admit that other evidence also given by them before the coroner was true; that in the course of such examination large portions of the evidence taken at the inquest were read in the case of Nellie Strutt, wife of the deceased.

It was in effect placing before the jury evidence taken at the coroner's inquest, not by asking questions in the ordinary way—even leading questions—but by reading a large portion of such evidence before the questions were asked.

It was not open to question that, if the evidence of the witnesses taken at the coroner's inquest had been tendered at the trial as part of the Crown's case, it must have been rejected. It was not the case of secondary evidence being tendered, the wit-

nesses being dead or out of the country. Even in such case, and especially in the absence of the prisoner at the coroner's inquest, and without the opportunity of cross-examination, the weight of authority is against its reception: Phipson's Law of Evidence, 5th ed., pp. 459, 460.

But here it is urged that what took place on the examination of the witnesses who had previously given evidence at the coroner's inquest, entitled the jury at the trial to receive and give weight to the evidence so taken at the coroner's inquest, because, it is said, the witnesses, although called by the Crown, proving adverse and having denied their evidence as given at the coroner's inquest, might be contradicted by the production of the evidence at the inquest; and, that evidence having been proven and put in, the jury could treat it as evidence for all purposes, and therefore in support of the facts tending to prove the prisoner's guilt. In short, that the witnesses denying or not admitting the truth of their evidence as given at the inquest, the same might become evidence at the trial by the perjury of the witnesses in denying it. This is rather a startling proposition and one to which I cannot accede except upon the clearest authority. None has been cited. The cases relied on by the Crown upon examination, in my opinion, not only do not support the position urged by the Crown, but are clearly adverse to it, as will, I think, clearly appear from an examination of them. This is especially the case in *Rex v. Curnock* (1914), 10 Cr. App. R. 207, and *Rex v. Yousry* (1914), 11 Cr. App. R. 13.

The following cases have been submitted on behalf of the Crown since the argument: *Rex v. Stroud* (1911), 7 Cr. App. R. 38; *Rex v. Morgan* (1911), *ib.* 63; *Rex v. Monk* (1912), *ib.* 119; *Rex v. Wann* (1912), *ib.* 135; *Rex v. Murray* (1913), 9 Cr. App. R. 248; *Rex v. Smallman* (1914), 10 Cr. App. R. 1; *Rex v. King* (1914), *ib.* 44; *Rex v. Curnock*, *ib.* 207; *Rex v. Yousry*, 11 Cr. App. R. 13; *Ibrahim v. The King*, [1914] A.C. 599.

In the *Stroud* case the objection was that the Recorder had improperly admitted statements made by the two accomplices in the presence of the appellant, to which he had not assented either by words or conduct. Bankes, J., said that "from the evidence of the appellant himself the jury were justified in finding that he received the bag of fat knowing its contents to be stolen.

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. . . The statement signed by the two accomplices was wrongly admitted by the Recorder as evidence against the appellant . . . But the improper admission of evidence has not led to any miscarriage of justice, and the case is, therefore, one in which the Court would not interfere with the conviction. It was a case where any reasonable jury, if properly directed, would have found a verdict of guilty."

In *Rex v. Morgan* the prisoner was convicted of larceny, before the Recorder of Liverpool. Objection was taken that there was misdirection. The Lord Chief Justice said: "If we had any doubt as to what the jury would have done on a proper direction by the Recorder, we should have quashed the conviction, since this Court is not here to re-try cases improperly tried below. But if we are convinced that on a proper direction the jury must have come to the same conclusion as they did upon the direction actually given them, then there is no substantial miscarriage of justice, and it is our duty to affirm the conviction, even although the point raised in the ground of appeal is determined in favour of the prisoner. Even though we may consider that the Recorder gave a wholly wrong direction to the jury . . . we are convinced that on the facts a jury, properly directed, would have given the same verdict, we must uphold the conviction."

In the *Monk* case it was held that a misdirection on part of the case for the prosecution is not a ground for quashing a conviction unless there has been "a substantial miscarriage of justice." The Court may look at the depositions taken before the magistrate, though they were not put in at the trial. Phillimore, J., gave the judgment of the Court, and quoted with approval Channell, J., in *Rex v. Cohen and Bateman* (1909), 2 Cr. App. R. 197. He there said: "If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or, at all events, no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the Judge, not being a wrong decision of a point of law."

In *Rex v. Wann* it was held that an insufficient direction or omission to direct on a material point is a misdirection leading to

"a miscarriage of justice" where it is reasonably probable that on a full direction the jury would not have convicted. The Lord Chief Justice said (7 Cr. App. R. at p. 139): "The effect of the cases on this subject is stated in *Ross on The Court of Criminal Appeal*, at p. 113, as follows: 'To have any effect in itself the misstatement of the evidence or the misdirection as to the effect of the evidence must be such as to make it reasonably possible that the jury would not have returned their verdict of guilty if there had been no misstatements.' With the alteration of one word 'possible' to 'probable,' we think that this statement is correct."

In the *Murray* case it was "urged that the Judge ought to have called the attention of the jury to the fact that in law they could not act on the child's evidence unless it was corroborated, since her evidence was not given on oath. The Lord Chief Justice said: "We think that that is the direction which ought to be given to the jury in such cases, that it ought to be pointed out to the jury that they must not act on the evidence of the child alone, but that there must be corroboration of it before they are entitled to regard the child's evidence at all. If we came to the conclusion that the jury convicted the appellant on the child's evidence alone we should have no alternative but to quash the conviction. . . . We must take into account what was said by the Judge, namely, that there was circumstantial evidence to corroborate the girl's story. We have come to the conclusion that there was corroborative evidence, and if the jury accepted it they could accept, and act on, the evidence of the child. We are satisfied that it was not a right direction in the circumstances, but we are also satisfied that no injustice has been done. For these reasons the appeal is dismissed."

In the *Smallman* case it was said that considerable latitude should be allowed the defendant's counsel in cross-examination. The Court further observes that "this Court has often had to deal with the proviso in sec. 4 (1) of the Criminal Appeal Act, and has expressed the opinion that, once it comes to the conclusion that a wrong decision has been given during the course of the case, the Court should never allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if such wrong decision had never been given." And

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in *Rex v. King* the above section was applied, notwithstanding the improper reception of evidence and misdirection. A perusal of this case makes it clear that the Court was of opinion that, notwithstanding the improper reception of evidence and misdirection, the result was not affected.

In *Rex v. Curnock* the appellant was convicted on an indictment charging him with feloniously receiving a hose-pipe; he was tried with another prisoner, Norman, who did not appeal. The appeal was based on misreception of evidence and misdirection. The Court held that "it was for the Recorder to direct the jury that, although the statement was admissible in evidence, and in strict law admissible against the appellant, they ought to be careful to discriminate against evidence of a statement by Norman and evidence of the facts stated by him. He ought to have told the jury to be careful not to accept the statement made as evidence of the facts stated by Norman. This is important, but under the proviso to sec. 4 of the Criminal Appeal Act, if we are satisfied, notwithstanding the failure to direct as above, that there has been no substantial miscarriage of justice, the conviction should stand." The Lord Chief Justice then proceeds: "We cannot think that, if the jury had had a proper direction, and had been told to disregard the statements of Norman as evidence of the facts stated, they would have come to any other conclusion than that to which they did come."

In *Rex v. Yousry* it was expressly held that counsel ought not to suggest to the jury, by cross-examination or otherwise, the contents of documents which he is not entitled to put in evidence. The case was one of libel and the pleading of justification. Then it was contended that there might have been prejudice in the minds of the jury; reference being made to *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57. Coleridge, J., said: "The question arose thus. The lady was being cross-examined, and counsel for the prosecution held in his hand a piece of paper, and instead of saying, 'Look at this piece of paper; do you adhere to your answer?' he described it as a report from the Cairo police as to her origin, and then invited counsel for the defence to look at it, who was sufficiently on his guard not to do so. The effect which it was calculated to produce was, no doubt, that this was a

report from the Cairo police so damaging to the appellant that her counsel dared not touch it. Now, that was inadmissible in evidence, and in our judgment that was a wholly wrong method to adopt. Counsel for the prosecution, holding documents in his hands which he cannot put in, has no right to suggest to the jury in any way what they are. . . . If we thought that the jury might have been influenced by this to such an extent as to alter their verdict, we should certainly interfere with it. But we are faced with the fact that here, if a jury did their duty, there could have been no verdict other than that of 'Guilty.'"

In *Ibrahim v. The King*, [1914] A.C. 599, it was held that, even if a confession was inadmissible in evidence upon the ground that it was made by the appellant in answer to his officer in whose custody he was, its admission, having regard to the other evidence given and to the circumstances of the case, was not such a violation of the principles of natural justice as entitled the appellant to have his conviction set aside—Lord Sumner, who delivered the judgment, declaring (p. 618) that "a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence" of the confession. "If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot in any view of the matter conclude that there has been any miscarriage of justice, substantial, grave, or otherwise."

Reference was made during the course of the argument to the *Makin* case, [1894] A.C. 57, where their Lordships had to determine the true construction of a statute of New South Wales, which provided "that no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice." It is pointed out that such a proviso is not to be construed as investing a statutory court of criminal review with the functions of the original trial Judge and jury.

The cases upon misdirection as to facts and law are reviewed in Ross on the Court of Criminal Appeal, pp. 110-114, inclusive. "There is . . . a miscarriage of justice where the Court . . . is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have

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brought about the verdict, and when, on the whole facts, and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted. . . . If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice . . . notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the Judge, not being a wrong decision of a point of law:" *Rex v. Cohen and Bateman* (1909), 2 Cr. App. R. 197, at p. 207, *per* Channell, J. "A summing up may, without misdirection, be so misleading as to cause a jury to go wrong:" *Rex v. Richman* (1910), 4 Cr. App. R. 233, 247. "Nondirection may amount to misdirection:" *per* Lord Alverstone, L.C.J., in *Rex v. Bradshaw* (1910), 4 Cr. App. R. 280, 284.

Nor do the sections of the Canada Evidence Act, R.S.C. 1906, ch. 145, referred to by counsel, strengthen in any way the Crown's contention. Section 9 provides that a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony. Before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. This section was passed not to admit what was not evidence, but for the purpose of contradiction. It does not provide that what was not otherwise evidence becomes evidence by the section, but simply that, before the party can be contradicted, the witness must, in the opinion of the Court, prove adverse: *Rex v. Curnock*, 10 Cr. App. R. 207; *Rex v. Yousry*, 11 Cr. App. R. 599; *Rex v. Dibble* (1908), 72 J.P. 498.

While one may infer from the notes that the witnesses did prove adverse, and that, had the trial Judge been applied to, he might have given leave to the Crown to prove that a witness

made at other times a statement inconsistent with his testimony, it does not appear that the Court was so of opinion or that leave was obtained. But, passing this point, and assuming that we may infer that leave was obtained, the statute in my mind did not make the production of the evidence taken at the inquest evidence of the facts therein contained as proof against the prisoner; and the trial Judge was bound, I think, if such evidence for the purpose of contradiction was admitted, carefully to caution the jury that they were not to receive it as proof of the facts pointing to the prisoner's guilt, but solely as proof of contradiction of the witness's statement at the trial, and that they ought not to convict the prisoner unless they were satisfied that there was sufficient evidence of his guilt without reference to that contained in the depositions of the witness at the inquest.

Then, with reference to sec. 10 of the Evidence Act, a party cannot in general cross-examine his own witness, though he may contradict him by independent evidence; but, when such witness proves adverse, he may not only cross-examine him, but, by leave of the Judge, prove that he has previously made statements inconsistent with his present testimony: Phipson, p. 470.

Section 11 would seem, from the marginal note, to have reference to cross-examination as to previous oral statements.

None of these sections was intended, in my opinion, to make that evidence of the facts of the case which would not otherwise be evidence thereof; the plain intention of the statute being to enable counsel to attack the credibility of the witness by shewing that he had previously made a different statement.

Section 1019 of the Code declares that no new trial shall be directed although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

It was held in *Rex v. Lovitt* (1907), 13 Can. Crim. Cas. 15, that it was ground for a new trial of a charge under the Bank Act for wilfully making a false return, that evidence of other returns, both before and after that in question, was admitted, and no instruction was given to the jury as to the limited purpose for which the other returns were admitted in evidence.

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In *Allen v. The King* (1911), 44 S.C.R. 331, the Chief Justice, dealing with this section, gave, as his ground for deciding that the conviction must be quashed and a new trial directed, that important evidence which was inadmissible was put in by the Crown, and this evidence may have influenced the verdict of the jury, and caused the accused a substantial wrong.

In *Rex v. Higgins* (1902), 36 N.B.R. 18, 7 Can. Crim. Cas. 68, it was held that, even if the trial Judge should in his charge to the jury direct them erroneously on a certain point, a new trial should not be granted if there was ample evidence of guilt apart from the point in question, and if, in the opinion of the court of appeal, no substantial wrong or miscarriage was occasioned by the error. See also *Rex v. Davis* (1914), 22 Can. Crim. Cas. 431; and *Rex v. Lew* (1912), 19 Can. Crim. Cas. 281, in which it was said that the court of appeal should not grant a new trial merely because a portion of the Judge's charge was objectionable, if of opinion that, irrespective of the charge, the jury could not have done otherwise than convict the accused, and consequently that the misdirection could not have done any "substantial wrong" to the accused, within the terms of sec. 1019.

In the present case, the learned trial Judge told the jury that it would be for them to come to a conclusion with reference to the statements made by individual witnesses at the trial and on a previous occasion, "whether the particular witness has told the truth to-day, or told it on another occasion under oath." Again, the learned trial Judge states, "Some witnesses have to-day told a different story—that which has been read to you—as having been sworn to by them on two previous occasions," referring to the evidence taken at the coroner's inquest and also taken on the preliminary hearing. Nowhere does he point out to the jury that the evidence taken before the coroner was inadmissible as such, and was only receivable to contradict the witness.

The accused was not present when at least a portion of the evidence was given. It would, indeed, be a curious anomaly if evidence taken before the coroner, while not admissible as such, can be admitted and full effect given to it by putting the witness into the box and having him deny that it is true.

Assuming that the case could not have been withdrawn from the jury in the absence of the evidence taken before the coroner,

I do not doubt that a substantial wrong or miscarriage was thereby occasioned at the trial. In my opinion, the learned trial Judge should have treated the evidence taken at the coroner's inquest as inadmissible, and to the extent that it might be used on cross-examination to contradict witnesses the jury should have been cautioned not to receive it as affirmative evidence of the facts as proven thereby at the coroner's inquest.

Mr. Cartwright referred to the case of *Regina v. Garner*, 6 Times L.R. 110. There the mother of the prisoner was called and gave evidence before the magistrate, which was different from that given at the Quarter Sessions. The depositions were not put in. The jury desired to see them, and they were thereupon read to the jury, shewing that the witness had contradicted herself. Lord Coleridge in giving judgment stated that the objection made to their admission was of the purest technicality and not to be encouraged. There was nothing wrong in letting the jury know the words in which the witness contradicted herself. It was not suggested that there was any prevention of re-examination, and he held that the conviction must stand. That case is quite distinguishable from the present.

The answer to the question in the stated case, "Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them, given at the inquest, or at the preliminary investigation?" should be "yes," and I am further of opinion that a substantial wrong or miscarriage was thereby occasioned on the trial, and that a new trial should be granted.

RIDDELL, J.:—This is a case submitted for the opinion of the Court by Mr. Justice Kelly, under sec. 1014 of the Criminal Code, in the matter of a charge of murder, as follows:—

"The question I now submit for the opinion of the Court is:—Was there in my charge to the jury either misdirection or non-direction in respect to the use made at the trial of the evidence of those three witnesses, or any of them, given at the inquest, or at the preliminary investigation?"

There are really three points for consideration, and, to understand them, the facts must be stated at least in part. I take some of these from the stated case as follows:—

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"The accused, Thomas Duckworth, was tried before me at the Assizes held at the town of Orangeville in and for the county of Dufferin, on the 22nd and 23rd days of February, 1916, on an indictment whereby the said Thomas Duckworth was charged with the murder of one Harry Strutt on or about the 2nd day of November, 1915, and at the said trial the said Thomas Duckworth was found 'guilty,' and was by me sentenced to be hanged on the 12th day of May, 1916.

"The said Harry Strutt was killed on the 2nd day of November, 1915, and on the evening of the same day an inquest was held before Dr. Berwick, a coroner in and for the county of Dufferin, as to the cause of the death of the said Harry Strutt, at which inquest Mrs. Nellie Strutt (wife of deceased), Mrs. Olive Duckworth (wife of the prisoner), and Hamilton Duckworth (brother of the prisoner), and others, gave evidence.

"Shortly after the said 2nd day of November, 1915, the said Thomas Duckworth having been accused of the murder of the said Harry Strutt, and having been arrested, he was at a preliminary investigation committed for trial.

"At the said preliminary investigation, the said Mrs. Harry Strutt, Mrs. Thomas Duckworth, and Hamilton Duckworth, or some of them, were examined as witnesses.

"At the trial before me, the evidence of Mrs. Nellie Strutt, Hamilton Duckworth, and Olive Duckworth, was in several respects contradictory of what they had sworn to on these previous occasions, and the Crown counsel, in his examination of these witnesses, whose attitude was hostile, drew their attention to their evidence previously given, and read to them much of that evidence."

It should be added that, where the witnesses did not expressly admit making the statements alleged to have been made by them, the fact was proved that they had.

Moreover, there was, in my view, ample evidence to justify a jury in convicting the prisoner if the evidence of the witnesses aforesaid was wholly disregarded or if their evidence at the trial was alone looked at.

The objection to the charge is, that the jury were led to understand, or under the charge might have understood, that they were at liberty to consider the evidence at the coroner's inquest

and on the preliminary inquiry as evidence of the facts of the case. The three points requiring consideration are: (1) Was the evidence on the former occasions evidence of the facts of the case—or was not the whole effect of the previous evidence a discrediting of the witnesses? (2) Was the charge objectionable in omission or commission in dealing with this former evidence? (3) What is the effect of sec. 1019 of the Code?

When a witness proves hostile, he may, with the leave of the Court, be proved to have made at other times a statement inconsistent with his present testimony; and it is admitted that the course taken at the trial in allowing such proof was regular. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 9, contains the following provision: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the Court, proves adverse, such party may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at other times a statement inconsistent with his present testimony. . . ."

This section derives in Canada from the statute 32 & 33 Vict. ch. 29, sec. 68 (in the same words), passed in the year 1869, the *annus mirabilis* in Canada of criminal legislation, and that section is taken (with a mere syntactical change) from the Imperial Act of 1854, 17 & 18 Vict. ch. 125, sec. 22. This was passed upon the recommendation of the Common Law Practice Commissioners, 1853, the draftsmanship being rather badly bungled, as is shewn in Wigmore on Evidence, vol. 2, pp. 1027, 1031, 1032. See also *per* Cockburn, C.J., in *Greenough v. Eccles* (1859), 5 C.B.N.S. 786, at p. 806.

This was declaratory of the law as it was understood by the best authorities of the time, and did not give the party calling a witness any rights he had not already, at least in criminal prosecutions. It may be that his rights were diminished by the requirement that the leave of the Judge must be obtained; but that inquiry need not be here pursued.

As to the clause permitting contradiction by other witnesses, by the end of the 18th century "the doctrine was clearly laid down that one's own witness could always be contradicted by others and his error shewn." Wigmore, vol. 2, p. 1038, citing Buller, N.P., 297; and with an occasional lapse it became estab-

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lished law in the early part of the 19th. See cases mentioned in note 4.

The "antiquated notion that a party cannot contradict his own witness"—to use the terminology of that great master of the law of evidence, Lord Denman, in *Wright v. Beckett* (1834), 1 Moo. & Rob. 414, at p. 420—in this way, should have had its quietus in *Lowe v. Jolliffe* (1762), 1 W. Bl. 365, where Lord Mansfield said: "We don't now sit here to take our rules of evidence from Siderfin and Keble." In that case, about a dozen and a half of witnesses called for the plaintiff swore that the testator was utterly incapable of making a will or transacting any other business at the time of making the alleged will and codicil, but the plaintiff called many witnesses "to encounter this evidence," and the will was established.

In *Greenough v. Eccles*, 5 C.B.N.S. 786, on counsel arguing that Bayley, J., was right when he said in *Ewer v. Ambrose* (1825), 3 B. & C. 746, "I have no doubt, that, if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty afterwards to make out his own case by other witnesses," Cockburn, C.J., said, "That was long ago settled" (p. 797). Williams, J., in giving judgment, said (p. 802) that this rule "was settled before the passing of the Act;" and Willes, J., the only other Judge, entirely agreed.

In *The Lochibo* (1850), 14 Jur. 792, at p. 793, Dr. Lushington, speaking of the rule in courts of law, says: "The rule . . . adopted in courts of common law . . . a rule respecting which there is no doubt, and respecting which there is no difficulty: it is, that if your witness, upon being examined in chief, or cross-examined . . . does depose utterly contrary to what might reasonably be expected of him, you shall be at liberty on the trial to adduce other witnesses, for the purpose of proving the facts which you originally intended to prove, and consequently of necessity, by such evidence, negating that which the witness has so said. Now, that I apprehend to be the principle beyond all dispute—beyond all doubt." And he refers to the course taken "in the great case of *Lowe v. Jolliffe*, 1 W. Bl. 365."

That this was supposed to be objectionable because it was impeaching one's own witness is perfectly clear from the history of the doctrine and the cases, unnecessary to cite or to consider here.

The second provision in the Act for discrediting one's own witness was in a somewhat different condition. Williams, J., in *Greenough v. Eccles*, 5 C.B.N.S. at p. 802, says (speaking of an adverse witness): "Whether you could discredit him by proving that he had made inconsistent statements, was to some extent an unsettled point." In *The Lochlibo*, 14 Jur. 792, counsel said: "No generally recognised principle on the subject does in reality exist, each case depending upon circumstances, and upon the practice of the Court before which the suit may happen to be" (i. e., upon "the length of the Judge's foot"). Dr. Lushington said, at p. 794, that he would prefer to decide that it was not competent to shew that a witness had made other statements at other times, for (this as) another reason, because all the authorities, with the exception of two, were in favour of that view "and those two cases . . . were cases of criminal trials, and they touch upon the question of looking at the depositions given before magistrates."

The *locus classicus* before the Act of 17 & 18 Vict. ch. 125, is, of course, *Wright v. Beckett*, 1 Moo. & Rob. 414, in the Court of Common Pleas at Lancaster. This was a civil action of trespass qu. cl. fr.; the plaintiff's counsel called four witnesses who were satisfactory; then he called a fifth, who contradicted the others. The plaintiff's counsel then asked him whether he had not given a different account of the facts to the plaintiff's attorney a few days before. Lord Denman overruled an objection made by the defendant to the question. The witness gave "an evasive answer," and the plaintiff's counsel called the plaintiff's attorney, who gave what he said was the statement to him of the witness. On motion in term, Lord Denman and Bolland, B., were the two Judges constituting the Court. There was no difference of opinion as to the propriety of contradicting one's own witness on questions of fact by calling other witnesses, but the Court divided on the question whether the previous contradictory statement could be proved "to discredit his own witness." Lord Denman had expressly told the jury "that they were not to look upon the statement given by W. (the witness) to the attorney before the trial, and read at the trial by the attorney, as evidence of the facts therein stated: they were only to receive that statement by way of neutralising the effect of the evidence which W. had unexpectedly given in court."

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In Term, Lord Denman did not change his opinion; and said "that, finding no direct authority compelling the exclusion of such evidence, and some which appear to me on principle to prove it admissible, and thinking that truth and justice may be most materially affected by that exclusion, I am bound to abide by the course I pursued at *nisi prius*, and must give my judgment" accordingly (p. 428); Bolland, B., agreed that there was no objection to calling other witnesses to contradict the adverse witness, but thought that previous statements could not be proved. He admitted (p. 431) that a Judge in a criminal trial had the right "to call for a witness's deposition, in order to impeach the credit of such witness, who on the trial contradicts what he had before deposed;" he did not and could not dispute the authority of *Rex v. Oldroyd* (1805), Russ. & Ry. 88, where all the Judges of England laid down that principle.

In *Rex v. Oldroyd*, the prisoner was on trial for murder. The name of his mother was on the back of the indictment, but counsel for the prosecution said they did not intend to call her. The Judge (Mr. Baron Graham) thought it right, in accordance with the usual practice at the time (a practice still occasionally followed), to have her examined, and this was done. The Judge observed that her evidence was in favour of the prisoner and materially different from her deposition taken before the coroner; he therefore thought it proper "to have the deposition read, for the purpose of affecting the credit of her testimony so given on the trial;" and in summing up the case to the jury he stated that her testimony was not to be relied upon, and left the matter of the prisoner's guilt entirely upon the other evidence. The jury convicted, and a case was reserved, "whether it was competent to the Judge, under the circumstances stated; to order the deposition to be read, in order to impeach the credit of the witness." All the Judges met, and took the case under consideration, when "they were all of opinion that it was competent . . . for the Judge to order the deposition to be read, to impeach the credit of the witness." Lord Ellenborough and Mansfield, C.J., were also of the opinion (although that was not necessary for the decision) that the prosecutor had the same right.

In *Rex v. Boyle*, mentioned in *Wright v. Beckett*, 1 Moo. & Rob. at p. 422, "A witness for the prosecution, on being examined, gave a different account of the transaction from what he had

deposed to before the committing magistrate. The counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to by counsel on behalf of the prisoner. Bayley, J., after consulting with Holroyd, J., admitted the proposed contradiction, and the prisoner was convicted."

There were, it is true, some criminal cases in which the evidence was not permitted to be given, e.g., in *Regina v. Ball* (1839), 8 C. & P. 745, Erskine, J., after consulting Patteson, J.; *Regina v. Farr* (1839), 8 C. & P. 768, Patteson, J. While it would seem that the law was much as it is put by counsel in the *Lochlibo* case, 14 Jur. 792, i. e., that the Judge determines the question, I can find no criminal case in which, the Judge allowing or calling for that evidence, his course was considered wrong. *Rex v. Oldroyd*, already cited, is, as Lord Denman puts it (1 Moo. & Rob. at p. 423) "a conclusive authority."

In civil cases the trial Judge sometimes allowed this method of impeaching one's own witness, sometimes not.

In *Bernasconi v. Fairbrother* (1833), cited in 1 Moo. & Rob. at p. 427, *Wright v. Beckett*, 1 Moo. & Rob. 414, and *Dunn v. Aslett* (1838), 2 Moo. & Rob. 122, Lord Denman allowed former statements to be proved. In *Holdsworth v. Mayor of Dartmouth* (1838), 2 Moo. & Rob. 153, Parke, B., in *Winter v. Butt* (1841), 2 Moo. & Rob. 357, Erskine, J., who cited another case of his, Patteson, J., agreeing, in *Allay v. Hutchings*, 2 Moo. & Rob. 358 (note), Wightman, J., rejected the evidence—these all at *nisi prius*.

In *Ewer v. Ambrose*, 3 B. & C. 746, a contradictory statement had been left to the jury as evidence of the facts. This was held to be wrong, but the question of its admissibility to discredit the witness was not determined; Bayley, J., rather inclined to its rejection (he was the same Judge who allowed it in *Rex v. Boyle*, *supra*); Holroyd and Littledale, JJ., not expressing any opinion.

In *Wright v. Beckett*, 1 Moo. & Rob. 414, 428, the Court (as we have seen) divided, and the ruling at *nisi prius* in favour of the admission stood.

In *Melhuish v. Collier* (1850), 15 Q.B. 878, a witness called for the plaintiff, proving adverse, was asked whether she had not said differently when before the magistrate (apparently on a criminal charge of assault for the same act for which the civil action was brought). She said it was all lies; then she was asked whether

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she did not say to the defendant's attorney that she had seen the defendant, etc., etc. The Judge, Cresswell, J., allowed the question. On the witness denying that she had so said, the defendant's attorney was not called to contradict. The question in Term was not whether the witness's former statements could be proved, but whether she could be asked such questions to discredit her. The Court in Term did not interfere with the verdict. Erle, J., says, at p. 890: "It not now necessary to ask whether a person to whom the former statement was made may be called to contradict the witness; for it was not done here. The point is one upon which Judges have differed, and opinions may vary to the end of time."

In civil actions, then, Judges differed. In the only case in Term, the course of allowing proof of former statements was approved by a divided Court.

In criminal prosecutions, Judges differed except where the trial Judge had the depositions taken before the magistrate read; there all the Judges of England agreed that the course was proper.

It was in that state of practice that the Act 17 & 18 Vict. ch. 125 was passed. That Act, as we have seen, allowed an adverse witness to be contradicted by other evidence (just as the authorities shew could be done without a statute): and by leave of the Judge could prove that he had made at other times a statement inconsistent with his present testimony (which was certainly the existing law in criminal prosecutions, and I think also in civil actions).

So far, then, at all events as concerns criminal prosecutions, the statute was the same as the existing law; it did not enlarge the rights of the prosecution, but probably limited them (on the assumption that the opinion of Lord Ellenborough and Mansfield, C.J., in *Rex v. Oldroyd*, was good law).

But the Act of 17 & 18 Vict. and the Canada Evidence Act do not give to such evidence any greater or other force than before.

Dr. Wigmore, in his able and exhaustive work on Evidence, gives a history of the practice of discrediting one's own witness, vol. 2, pp. 1017 *et seq.*, paras. 896 *et seq.*, which I do not enter into. He says, however, in answering an objection, that "we are not asked to believe his" (the witness's) "prior statement as testimony,

and we do not have to choose between the two . . . We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other, but without determining which one. . . . We do not in any sense accept his former statement as replacing his present one; the one merely neutralises the other. . . . The prior contradiction is not used as a testimonial assertion to be relied upon." The learned author continues: "Prior self-contradictions, when admitted, are not to be treated as assertions having any substantive or independent testimonial value; they are to be employed merely as involving a repugnancy or inconsistency; otherwise they would in truth be obnoxious to the Hearsay Rule:" para. 1018.

Many cases are given in the American Courts, e. g., *Charlton v. Unis* (1847), 4 Gratt. 58, 60: "Such testimony of inconsistent statements is admissible only for the purpose of impeaching the credit of the witness, but cannot be received as evidence of any fact touching the issue to be tried."

Of the cases cited, p. 1180, note 2, I refer specially to two in the Supreme Court of Illinois, *Ritter v. People* (1889), 130 Ill. 255, and *Purdy v. People* (1892), 140 Ill. 46. In the former case the trial Judge was asked to charge the jury that "what any witness . . . may have testified to before the grand jury or at the coroner's inquest is no evidence of the guilt of the defendant." He refused. The Supreme Court held that what the witnesses had sworn to before the coroner was evidence, but "could only be considered by the jury in weighing the testimony of the witnesses, as to the facts sworn to before them, and not as establishing independent facts testified to on a different occasion."

In the *Purdy* case the facts were the same: evidence given before the coroner different from that at the trial, and the ruling was the same.

In the Courts of the States of the American Union, the rule seems to be uniform—some fifteen States are mentioned in the note.

The same rule is found in the English Courts. I shall examine the cases in which this evidence was admitted, etc., to see the object for which it was admitted.

In *Ewer v. Ambrose*, 3 B. & C. 746, 5 Dowl. & Ry. 629, 107 Eng. Rep. 910, already mentioned, where a witness called for the

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defendant to prove a partnership proved the contrary, he was confronted with his answer to a bill in Chancery in which he had sworn to the partnership. Bayley, J., p. 749, said: "The answer of itself was not evidence of any fact, and it was left to the jury to consider whether they would credit the testimony given by the witness at the trial, or that given in his answer in Chancery;" and thought a new trial should be granted. Holroyd, J., agreed: "I am clearly of opinion that it was not admissible to prove substantively the partnership. But it is a very different question, whether it was not evidence to destroy the credit of the witness as to the particular fact to which he swore. Now, the learned Judge considered the answer as if it were substantive evidence of the fact of the partnership. . . . The case was not properly presented to the jury . . . there ought to be a new trial." Littledale, J.: "It may be a doubtful question, whether the answer in Chancery was properly received to prove a different state of facts from that which the witness had sworn to at the trial."

In note (a) to this case the evidence is considered as "offered merely for the purpose of discrediting the witness . . . not tending to prove or disprove the issue joined."

In *Melhuish v. Collier*, 15 Q.B. 878, the Judge warned the jury that nothing the witness had said on the previous occasion "was to be taken as proof of these facts," and this course was approved by Coleridge, J. (explicitly), and Erle, J. (by implication).

In *Rex v. Oldroyd*, Russ. & Ry. 88, the evidence was used only "for the purpose of affecting the credit of her testimony . . . given on the trial," and what she said was excluded from the consideration of the jury, her contradictory statements being considered to render her evidence negligible. The question reserved for the opinion of the Judges was, whether the Judge could order the deposition to be read "in order to impeach the credit of the witness;" and all the Judges were of opinion that it was competent for the Judge to order the deposition to be read, "to impeach the credit of the witness."

Rex v. Boyle is reported only in Lord Denman's judgment in *Wright v. Beckett*, 1 Moo. & Rob. at p. 422; but, in *Wright v. Beckett*, "the Lord Chief Justice, in summing up the case to the jury, told them, that they were not to look upon the statements given by

Warrener (the witness) to the attorney before the trial, and read at the trial by the attorney, as evidence of the facts therein stated: they were only to receive that statement by way of neutralising the effect of the evidence which Warrener had . . . given in Court."

In *Bernasconi v. Fairbrother*, 1 Moo. & Rob. at p. 427, an attorney was permitted to prove that the witness, immediately before the trial, had made to him a different statement from what he swore at the trial "to neutralise that swearing." This was followed in *Dunn v. Aslett*, 2 Moo. & Rob. 122. *Ewer v. Ambrose* has been already cited on the point.

No case has been suggested that where such evidence is admitted it can be used for any other purpose; and, in the absence of express authority, we should not hold that it can.

On principle I can see nothing to support a contrary conclusion.

Admittedly the previous evidence is not (*primâ facie*) evidence at all on the present trial, and could not even be referred to by the counsel for the Crown unless and until the witness proved adverse. Could it be that the attitude of a witness with whom the accused has nothing to do, over whom he has no control, whom he has not even subpœnaed, can make that evidence against him which otherwise would not be?

Again, it is only by leave of the Court that the former statements can be proved at all. I yield to no one in my regard for the office of Judge, *ministerium meum honorificabo*; but I cannot conceive it possible that Parliament would put into the hands of any one person the power to make evidence against an accused without some act or default of the accused himself. At least, if such a power were intended to be conferred, express and unmistakable language would be employed.

Nor is it to be forgotten that it is not only sworn statements on a former occasion which can be thus proved; these statements may have been made without the sanction of an oath, and, if the suggested effect be given to former sworn statements, the same will be the case with others not sworn. No distinction is made in the cases or in the Code.

I think that the evidence must be confined in its effect to the discrediting of the witnesses who had proved adverse.

That evidence rightfully admitted for one purpose may not be evidence for another is too clear for argument. The case of

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Rex v. Curnock, 10 Cr. App. R. 207, will be referred to at a later part of this judgment.

Secondly. Was the charge objectionable in dealing with this former evidence?

I entirely accede to the argument of Mr. Cartwright that all the charge must be looked at, that the charge must be taken as a whole; but that does not mean that an average is to be struck of the charge, that expressions adverse to the accused are to be set off against those favourable to him, and that, if they fairly well balance, the charge is unobjectionable. What is meant is something like this: if there are objectionable expressions in the charge, examine and find if these have not been neutralised by something else either before or after—if the virus suspected has not been rendered innocuous by prophylactic measures or healed by a medicine—if the law has not been made so plain that an incorrect or erroneous statement cannot mislead. If so, the charge, “taken as a whole,” is unobjectionable.

But, if there is an objectionable statement, objectionable by misstatement, understatement, or overstatement of the law, calculated to mislead the jury, the objection is not healed by statements favourable to the prisoner, however favourable, unduly favourable it may be, they seem and are.

The parts of the charge objected to are these:—

“It goes without saying that this case is not by any means free from those contradictions. You must have noticed how very distinctly and positively witnesses have contradicted one another, and even contradicted themselves as between statements made by them on previous occasions and statements made by them to-day. Now, it will be for you to come to a conclusion on those statements, whether the particular witness has told the truth to-day, or told it on another occasion under oath. Personally, I am glad that the duty is not mine, and that, the facts being altogether for you, the jury relieves me from the responsibility of passing upon that phase of the case. . . . Whose story is right? Is the story of Mrs. Pell correct, that her brother was shot and fell back into her arms before Hamilton Duckworth left the window, and before there was any scuffle between the parties, or do you believe Hamilton Duckworth’s story at either the inquest or the preliminary inquiry—I have forgotten which—is

correct? He denies it to-day. . . . If you believe the accused's story, that would be the solution of it. If, on the other hand, you believe the story of Mrs. Pell, or if you believe what these witnesses who have contradicted themselves in the box to-day said on the earlier investigations, you will have to consider whether or not the prisoner's story is believable."

I am wholly unable to see how any jury on the charge would have supposed that what the witnesses swore on the previous occasions was not evidence, at the trial, of the facts of the case. It seems to me that they were in effect charged that it was such evidence.

The virus being present, we must inquire whether preventive vaccination or curative serum was employed to destroy or modify its effect.

The only passage relied upon by the Crown, in substance, the only one I can find, is in the early part of the charge; and it is as follows: "When you entered the jury-box, the clerk read to each of you separately the oath which binds you to the duty that is now imposed upon you—that you would a true verdict give according to the evidence. I particularly ask you to bear that in mind; because it would be impossible that you should not, before this trial, have come to know something about the unfortunate occurrence which we are now investigating—all of you being residents of this county—either through the newspapers, by association with your fellowmen, by talking with your neighbours, or with those who were present at the preliminary investigation, or otherwise. Now, I ask you to blot out from your minds everything you have heard except while you have been in the jury-box and from the lips of the witnesses alone. That constitutes the story from which you are to deduce the facts of this case. The address of counsel for the Crown at the opening of the case, the address of counsel for the accused, and the address of counsel for the Crown following it at the close of the testimony, are not evidence; they are explanations of the case. The address of the counsel for the Crown at the opening of the case was to give you some understanding of what it was all about; and, after the evidence is all in, the addresses of counsel are for the purpose of each counsel, from his own side, putting together the facts as he understands them; or, in other words, to urge them according to the

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theory he is putting forward . . . You will approach the consideration of the evidence without any feeling one way or the other, without any feeling of bias or prejudice against the accused, without any feeling of favouritism toward the accused. It is a cold, cold duty you have to perform. It would be a horrible thing if, in such cases as this, any such influences as these were to be exerted over your minds when you are considering the evidence."

No one but must agree in this, admirably put, but it does not touch the point now under discussion. The jury were warned against anything not in evidence; the warning was not against applying what was in evidence to that to which it was not properly applicable.

Nor is it a fatal obstacle that no objection was made to the charge: *Rex v. Wann*, 7 Cr. App. R. 135, at p. 137, per Lord Reading, L.C.J.

In *Rex v. Blythe*, a murder case, no objection was made to the charge, on an application to myself as trial Judge the alleged omission in the charge was not made a ground, on an appeal to the Court of Appeal the point was mentioned for the first time, and counsel again applied to me for a case upon that point. I refused; no case calling for the statement in the charge alleged to have been omitted had been made at the trial, and nothing of the kind had been even suggested till after months of consideration and two reprieves. The Court of Appeal, however, allowed an appeal and a new trial. The Chief Justice of Ontario said: "There can be no reason to suppose for a moment . . . that if the learned trial Judge had been requested to charge the jury in the way in which it is now stated he should have done, he would have refused to do so:" *Rex v. Blythe* (1909), 19 O.L.R. 386, 395. *Rex v. Blythe* must not be taken as authority for the proposition that any omission, any error in the Judge's charge, will justify a new trial; but only that, if the error or omission be such that a new trial should be granted, the omission at the trial of objection or of request on the part of the prisoner's counsel will not necessarily prevent the Court from ordering a new trial. That case, moreover, was decided on its own facts, a combination of circumstances (not all appearing in the reports) not likely to occur again.

The statement in *Rex v. Meade*, [1909] 1 K.B. 895, at p. 898, "When a Judge sums up to a jury he must not be taken to be

inditing a treatise on the law," is still good law; the question to be determined is always whether the law has been explained to the jury in such a way, both as to extent and as to content, that the jurymen will thoroughly comprehend what it is they are trying without misapprehension of the law applicable to the case.

In the present instance, I cannot but think that the jury were given to understand that, in determining the facts, they might consider what the witnesses had sworn previously—and this I think wrong.

In *Rex v. Curnock*, 10 Cr. App. R. 207, following *Rex v. Christie* (1914), *ib.* 141, it was held that evidence of a statement made in the presence of a prisoner is admissible, but is not evidence of the truth of the facts. Such evidence had been given, but "no direction was given to the jury that they were not to take it as evidence of the facts." On this being stated to the Court of Criminal Appeal by counsel for the prisoner, he was stopped by the Court, and counsel for the Crown called upon to shew that there had been no substantial miscarriage of justice, and therefore sec. 4(1) of the Criminal Appeal Act, 7 Edw. VII. ch. 23, saved the conviction.

There remains to be considered the effect of sec. 1019 of the Code: "No conviction shall be set aside nor any new trial directed although it appears that . . . something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial . . ." In the absence of such legislation as is found in this section, it is, in my view, clear that the conviction could not stand. If evidence had been wrongly admitted, or, what is the same thing, directed to be wrongly applied, *Rex v. Oldroyd* shews that the conviction would be bad, no matter how much or how strongly the remaining evidence bore against the prisoner.

This section does not mean that the Court is to examine and see if the accused person has committed the act charged against him—the commission of the act does not in itself subject the actor to punishment, it is conviction of the offence which renders the offender liable to punishment. Society has for its own protection decreed that before any one can be punished by the State he must be convicted in a method prescribed (I speak

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generally); and the right to a trial in the prescribed method is as much the right of an accused as any other right. Courts are not given the sword of retributive justice—they cannot give to an accused what they believe he deserves, their powers are limited by law and within law; this is for the protection of the State, not wholly for the protection of the prisoner. The section modifies the common law, but does not abrogate its principles, and the modification must be carefully scrutinised.

Before we can order a new trial, we must be of the opinion that “some substantial wrong or miscarriage was . . . occasioned on the trial” by something “not according to law” which “was done at the trial,” or by the “misdirection given.” “Miscarriage” means here, of course, “miscarriage of justice,” the terminology used in the Imperial Criminal Appeal Act of 1907, 7 Edw. VII. ch. 23, sec. 4(1). As is shewn in many cases, there are instances of errors which are “not of sufficient importance to induce us to say that there has been a miscarriage of justice:” *per* Lord Reading, L.C.J., in *Rex v. Murray*, 9 Cr. App. R. 248, at p. 249; the error “could not have affected the result:” *per* Bankes, J., in *Rex v. King*, 10 Cr. App. R. 44, at p. 49; in some cases of misdirection the Court “cannot think that, if the jury had had a proper direction . . . they would have come to any other conclusion:” *per* Lord Reading, L.C.J., in *Rex v. Curnock*, 10 Cr. App. R. 207, at pp. 208, 209; but it is thoroughly established that “once it comes to the conclusion that a wrong decision has been given during the course of the case, the Court should never allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if such wrong decision had never been given:” *per* Lord Reading, L.C.J., in *Rex v. Smallman*, 10 Cr. App. R. 1, at p. 4.

That this applies to a case of misdirection or nondirection as to the applicability of evidence, is clear from *Rex v. Curnock*; had the Court not been convinced that the jury would have convicted even had they been charged that the evidence, admissible as it was, was not evidence of the truth of the facts stated, it would have set aside the conviction. So in *Rex v. Morgan*, 7 Cr. App. R. 63, Lord Reading, L.C.J., says: “If we had any doubt as to what the jury would have done on a proper direction. . . . we should have quashed the conviction;” *cf. Rex v. Monk*, 7 Cr. App. R. 119.

I have read the evidence more than once, and, as I have said, there is ample evidence to support a conviction entirely aside from that of the witnesses mentioned; moreover, there is ample evidence to support a conviction, even if the previous inconsistent statements had not been proved; still it is to my mind impossible to say with confidence, it is impossible to bring the mind to such a state that it "cannot but think," that, had the jury been told that they were not to take the previous evidence as evidence of the facts, they would nevertheless have convicted.

It is of course not proper to express any opinion as to the guilt of the prisoner.

In that state of the case, sec. 1019 does not prevent the success of this application.

For these reasons, I think that, under the powers given us by sec. 1018 of the Code, we should direct a new trial

The following cases have not been overlooked: *Rex v. Higgins*, 7 Can. Crim. Cas. 68; *Rex v. Brooks* (1906), 11 Can. Crim. Cas. 188; *Allen v. The King*, 44 S.C.R. 331, 18 Can. Crim. Cas. 1; *Rex v. Paul* (1907), 18 Can. Crim. Cas. 219; *Rex v. Lew*, 19 Can. Crim. Cas. 281; *Eberts v. The King* (1912), 20 Can. Crim. Cas. 273; *Rex v. Graves* (1912), 20 Can. Crim. Cas. 438; *Rex v. Ratz* (1913), 21 Can. Crim. Cas. 343; *Rex v. Allen* (1913), 22 Can. Crim. Cas. 124; *Rex v. Davis* (1914), 22 Can. Crim. Cas. 431; *Rex v. Stroud*, 7 Cr. App. R. 38; *Rex v. Yousry*, 11 Cr. App. R. 13; *Ibrahim v. The King*, [1914] A.C. 599; and I have examined many others.

MASTEN, J.:—Argument of motion on reserved case submitted by Kelly, J.

The question submitted is in the words following: "The question I now submit for the opinion of the Court is:—Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses (Nellie Strutt, Olive Duckworth, and Hamilton Duckworth), or any of them, given at the inquest, or at the preliminary investigation?"

This is the only question before this Court. Whether or not the facts deposed to by the witnesses who were examined at the coroner's inquest and at the preliminary hearing before the magistrate were admissible in evidence, or whether their depositions

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were properly proved, is not, I think, a matter for our consideration. Concerning it no objection was made at the time, and no question is now reserved or raised.

The case submitted seems to me to involve one principal question, namely, whether the statements made at the inquest and on the preliminary investigation by the three witnesses above named were treated as evidence to the jury of the facts set forth in their depositions, or were only evidence that they had on previous occasions made statements differing from the testimony which they were then giving; in other words, whether the statements made on the earlier occasion are relevant only on the question of the credibility of the witnesses then under examination, or are relevant on the general issue, "guilty or not guilty."

The question seems to me to depend entirely upon the interpretation of sec. 9 of the Canada Evidence Act, R.S.C. 1906, ch. 145, which is as follows: "9. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement."

This provision in the Canada Evidence Act is substantially identical with the provision of the Imperial Act 28 & 29 Vict. ch. 18, sec. 3, which is as follows: "3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

The proper interpretation of the section last quoted has been the subject of consideration in numerous cases, out of which I

select the following as affording the clearest indication of the interpretation which has been placed upon the section in the Courts of England.

Rex v. Dibble, 72 J.P. 498. This was a trial of B. and C. for burglary. A. was called by the prosecution, and he swore that, though he was guilty, C. was innocent. Leave was obtained by the Crown counsel to treat him as a hostile witness, and a written confession made by him previously was put in, under sec. 3 of 28 & 29 Vict. ch. 18, and so came to the minds of the jury. The Recorder, in summing up the case, directed the jury to disregard the written confession, and advised them to acquit C.; but he was found guilty. In giving judgment Alverstone, L.C.J., said that the learned Recorder was most careful in his direction to the jury. The real difficulty was that the jury had before them evidence as to the written statement made by A. implicating the appellant, but which was not evidence admissible against him. That statement was properly admitted under the statute on the cross-examination of A., but it was not evidence against the appellant. The Recorder cautioned the jury, and did his best to prevent them acting on this statement to the prejudice of the appellant. But the fact remained that this statement did come to the minds of the jury. "We cannot help feeling that the jury may have thought that" A. told the truth about the appellant in his written statement. The Court of Criminal Appeal found that, apart from such statement, there was insufficient evidence to support the conviction, which was therefore quashed.

Rex v. Williams (1913), 29 Times L.R. 188, was an appeal from a conviction for murder. At the Assizes, the Crown prosecutor called as a witness one Florence Seymour. She had been previously examined in the Police Court, and her story as there told would be such as to convict the prisoner. In examining her at the Assizes, the Crown counsel was allowed to treat her as a hostile witness. The complaint of the appellant before the Criminal Court was, "that the Judge, in his summing up, practically told the jury that it was for them to decide which of the two stories told by the witness they would accept. That was a misdirection." The judgment of the Court was delivered by Lord Alverstone, C.J., and in the course of it he says: "The jury had, of course, to deal with the evidence given at the trial, and

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if that evidence contradicted the whole of the evidence given at the Police Court, then the evidence given at the Police Court was not of itself evidence against the prisoner." The Court concluded, upon the construction of the words used by the trial Judge in his charge to the jury, that there had been no misdirection, and the appeal was dismissed.

Rex v. Curnock, 111 L.T.R. 816, 10 Cr. App. R. 207, was an appeal in the Court of Criminal Appeal against a conviction at the Bristol City Sessions for receiving stolen property. At the Police Court, one N. pointed to the appellant and said: "That is the man who brought the hose-pipe up from the cellar in Penn Street yesterday and went with me to Brislington to try and sell it." The appellant said, "That is a lie." In delivering the judgment of the Court, Lord Reading, C.J., said (111 L.T.R. at p. 817): "The appellant was convicted on an indictment which charged him with feloniously receiving a quantity of hose-piping. He was tried, together with another prisoner, N., who does not appeal. The grounds of appeal are misreception of evidence and misdirection. The prisoner N. made certain statements which counsel for the appellant contends were not admissible against the appellant. If they were admissible, he says, they were only evidence against N. and not against the appellant, and he says that there ought to have been a direction to the jury to this effect. With one part of his argument we agree, that the Recorder should have directed the jury that, although the statement by N. was admissible in evidence, and in strictness legally admissible against the appellant, *yet the jury should carefully distinguish between evidence of a statement made by N. and evidence of the facts as stated by him. The jury should have been told that they must be careful not to accept the statement made by N. as evidence of the facts contained in such statement.* This distinction is an important one, but under the proviso to sec. 4 of the Criminal Appeal Act, if we are satisfied that, even in the absence of any such direction, there has been no substantial miscarriage of justice, the conviction must stand."

These decisions seem to me to make it plain that the true interpretation of our statute is that the statements made by the witnesses named in the reserved case were not evidence of the facts contained in those statements, and that it was the duty

of the trial Judge to warn the jury that the statements must be disregarded as proof of such facts.

A careful perusal of the evidence of these witnesses and of so much of the other testimony as makes plain their depositions, together with a perusal of the Judge's charge, leads me to the conclusion that the jury may well have been under the belief that they were entitled to accept the depositions given before the coroner and on the preliminary investigation as evidence of the facts therein stated.

The words of the trial Judge which are complained of are as follows:—

"You must have noticed how very distinctly and positively witnesses have contradicted one another, and even contradicted themselves as between statements made by them on previous occasions and statements made by them to-day. Now, it will be for you to come to a conclusion on those statements, whether the particular witness has told the truth to-day, or told it on another occasion under oath."

"Prisoner returns to his house; and then we get into the very heart of the contradictions. I am not going over the whole story—some witnesses have to-day told a different story—that which has been read to you—as having been sworn to by them on two previous occasions."

"Whose story is right? Is the story of Mrs. Pell correct, that her brother was shot and fell back into her arms before Hamilton Duckworth left the window, and before there was any scuffle between the parties, or do you believe Hamilton Duckworth's story at either the inquest or the preliminary inquiry—I have forgotten which—is correct? He denies it to-day."

"If, on the other hand, you believe the story of Mrs. Pell, or if you believe what these witnesses who have contradicted themselves in the box to-day said on the earlier investigations, you will have to consider whether or not prisoner's story is believable. No gun is found or accounted for at all. If there was a scuffle, if you believe Mrs. Pell, it was after the shooting had taken place, and after Hamilton Duckworth had come from the window and had seized the accused at the head of the stairs, that he got hold of the gun and scuffled to get it from him, perhaps to protect himself."

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I do not think that the effect of these statements is corrected or effaced by the preliminary statement of the trial Judge at the opening of his charge, where he uses these words:—

“Now, I ask you to blot out from your minds everything you have heard except while you have been in the jury-box and from the lips of the witnesses alone. That constitutes the story from which you are to deduce the facts of this case.”

In reaching this conclusion, I have been much pressed by the consideration of the the grave difficulty, amounting almost to impossibility, in carrying the rule into practical effect. It is common ground that the witnesses were hostile. It is common ground that the statements made by the witnesses on previous occasions are admissible in evidence. It is common ground that they are admissible for the purpose of nullifying the effect of the testimony then being given by such witnesses; and, in order that the jury may determine whether the witness is telling the truth at the trial or told it on a previous occasion, the jurymen must weigh the statements made at the trial and contrast them not only with the statements made on the previous occasion, but with the other testimony which has come out in the course of the trial. Assume that he reaches the conclusion that the testimony now being given at the trial is false, and that the earlier statement is true. The duty of the jurymen then is to disregard the evidence given by the witness at the trial, as being false testimony. But, having reached that conclusion, and having struck from his mind the testimony of the witness, he must then proceed to obliterate as well the statement given by the witness on the previous occasion, which he has just concluded a moment before to be true. Is that humanly possible?

But it appears to me that with this question this Court is not concerned. We have only to deal with the statute as it stands, and not with the results which flow from it; and it appears to me that, having regard to the reasoning and decisions which I have quoted and to the practice of the Court, no other conclusion can be reached than that at which I have arrived.

I think there is ample evidence, apart from the preliminary statements of the witnesses above mentioned, from which the jury might have inferred that the prisoner killed Harry Strutt. It is not a question for this Court whether the prisoner was guilty or not, but only to determine whether the jury or any one of them

may have been influenced by the facts brought to their attention in connection with the preliminary statements of these three witnesses.

I am unable to say that they were not influenced; and I think that the statement of the trial Judge fails to inform the jury of the law; on the contrary, it encourages the view that the jury were entitled, if they saw fit, to rely on the statements made before the coroner and before the magistrate, to support their verdict.

Having regard to the decision of the Supreme Court of Canada in the case of *Allen v. The King*, 44 S.C.R. 331, I am of the opinion that a new trial must be ordered.

MEREDITH, C.J.C.P.:—The prisoner was, on the 24th day of February last, convicted of the murder of his brother-in-law, Harry Strutt; and was, on the same day, sentenced to be hanged on the 12th day of May instant.

Harry Strutt was shot and killed, on the 2nd day of November last, at about two o'clock in the afternoon, in a house that was occupied by him and the prisoner, and where a sister of Strutt—Mrs. Pell—was visiting. Mrs. Pell, Strutt and his wife, who is a sister of the prisoner, and the prisoner and his wife, were all in the house, together with the prisoner's brother, Hamilton Duckworth, at the time; but the man was killed upstairs, where only he and his sister Mrs. Pell and the prisoner and his brother Hamilton were, and they were the only eye-witnesses of the tragedy.

In the evening after the occurrence, an inquest was held upon the body of the dead man; and about a week afterwards the usual preliminary investigation of the charge of murder, upon which the prisoner stands convicted, was also held: and on each of these occasions the four persons I have referred to—Mrs. Pell, a sister of Strutt, Hamilton Duckworth, a brother of the prisoner, Mrs. Strutt, the widow of Strutt and sister of the prisoner, and Mrs. Duckworth, the wife of the prisoner—were all examined as witnesses; and on each occasion all of them gave evidence, quite in harmony, proving the killing of Strutt by the prisoner under circumstances which could hardly have left the jury any alternative to a verdict of guilty of murder.

The same witnesses were again examined at the trial, where Mrs. Pell again adhered to her story; but the other three witnesses

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denied the truth, speaking generally, of that which on each of the earlier occasions they had said; but, on examination of two of them as adverse witnesses, and upon cross-examination of the other, their denials were so shaken and such admissions were made by them, that reasonable men might find, upon their own testimony at this trial only, that their former story was true and that the later one was false, and made up only for the purpose of shielding their brother and husband. I shall not take up time reading any but a few words shewing the character of their evidence at the trial, adding this only: that, if any one can read all of the evidence of each of these witnesses at the trial and then conscientiously say that reasonable men could not, on that evidence alone, find that the earlier story was true and the later false, I shall be astonished; at all events no one yet has said so.

Hamilton Duckworth's testimony was obviously much the most important of that of the three who, on one or other occasion, according to their own testimony at the trial, had testified to that which was untrue—had on two occasions so unequivocally inculpated, and on the third occasion tried to exculpate, the prisoner. He and Mrs. Pell and the prisoner are now the only living eye-witnesses of the deed. I therefore take from his testimony these few words shewing the character of the testimony of these witnesses at the trial:—

“Q. Did you say then, at the preliminary hearing, a week afterwards, bottom of p. 16, ‘When I heard the shot I looked and saw Thomas Duckworth with a gun in his hand.’ Is that right? A. I do not know very much about it.

“Q. ‘When I heard the shot I looked and saw Thomas Duckworth with a gun in his hand.’ Is that right or wrong? A. Well, I do not know.

“Q. ‘Answer the question: would it be right or wrong? ‘A. Well, I guess it would be right.’ Did you say that? A. It was not right.

“Q. You said, ‘I was looking out of the window when I heard a shot fired.’ Was that right? ‘A. I cannot mind.’ Is it right or wrong? You swore to it. You signed it. A. I guess it must be right if I signed it.”

“Mr. Agar: Did you make that statement I have just read to you at the preliminary hearing? A. No.

"Q. Did you say that? A. No, I do not mind saying anything.

"Q. You were sworn to tell the truth that time, were not you? A. Well, I was sworn to tell the truth.

"Q. Did you try to tell the truth at that time? A. I did try to tell the truth."

Could any one read this, and all else his testimony at the trial, without being quite able to believe that it was true that at the preliminary hearing the witness really did "try to tell the truth," and without being able to go a step further and believe that really he not only tried to but succeeded. And, if that be so, it is an end to this appeal; the evidence of the preliminary investigations was made evidence at the trial, by the admissions and evidence of two adverse witnesses and the cross-examination of the third witness, as to its truth, there.

Besides all that, there was strong circumstantial evidence of the truth of the earlier story and the falsity of the later, evidence upon which reasonable men might have found the prisoner guilty, even if Mrs. Pell too had acted as the other three witnesses did.

Then what is this appeal about?

It is said that it is brought: (1) because the trial Judge told the jury that the evidence of these three witnesses at the earlier investigation might be taken into consideration by them in finding the prisoner guilty or not guilty of the crime with which he was charged: or that at all events (2) he should have told them that they could not do so, but must look at it only for the purpose of determining whether they should or should not give credit to the evidence, at the trial, of these three witnesses.

No substantial question of law is involved in these points: there can be no real contention as to the effect of the law of evidence in the circumstances of this case. Except in those cases in which the law makes the depositions of a witness taken upon another occasion evidence at the trial—for an instance, see the Criminal Code, sec. 999—they are not evidence; nor, of course, are statements made not under oath. On the other hand, it ought to be equally clear that where, at the trial, a witness makes such admissions, or gives such evidence, in regard to his former contradictory statements that reasonable men might from his evidence at the trial find them to be true and act upon them, not

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only are they evidence but are alone evidence sufficient to support a conviction.

I cannot think that it was meant to be contended that evidence of former contradictory statements can be referred to solely for the purpose of shewing that the witness is not a credible person, that is not accurately stating even its primary purpose, which is to disprove his testimony at the trial. It could hardly be contended that, if a witness, asked whether his former statement was true, should say eventually that it was, that testimony could not be accepted as proof of the truth of the former statement, but must be limited to its effect upon the credibility of the witness.

So that really all that is substantially in question here is: What did the trial Judge tell the jury upon this subject? And, whatever it may have been, was it within or without the law of evidence which I have just mentioned?

Before reading the comparatively few words, taken from three different and widely separated parts of the charge, upon which reliance is now placed, it is proper that I should read a few earlier words of the charge spoken generally as governing all that which was to follow:—

“Now I ask you to blot out from your minds everything you have heard except while you have been in the jury-box and *from the lips of the witnesses alone.*”

That is not strictly accurate, but the prisoner cannot complain that it is too wide: it is too narrow.

Again, preceding the words objected to: “You have to work out, *on the evidence you have heard*, just what you are going to make up, in your minds, what the facts are.”

And now I read the words objected to, and read them without their context so that they may be looked upon in the strongest light possible in the prisoner’s interests:—

“You must have noticed how very distinctly and positively witnesses have contradicted one another, and even contradicted themselves as between statements made by them on previous occasions and statements made by them to-day. Now, it will be for you to come to a conclusion on those statements, whether the particular witness has told the truth to-day, or told it on another occasion under oath. . . . Prisoner returns to his house; and then we get into the very heart of the contradictions.

I am not going over the whole story—some witnesses have to-day told a different story—that which has been read to you—as having been sworn to by them on two previous occasions. There is the evidence of the expressions made use of by him when he came home, of his action in getting a gun in the room adjoining the kitchen (into which he had passed), putting cartridges or something, a witness says, into it, going up the stairs after saying they would know in a minute what he was going to do. And then the story of Mrs. Pell as to what happened. . . . Whose story is right? Is the story of Mrs. Pell correct, that her brother was shot and fell back into her arms before Hamilton Duckworth left the window, and before there was any scuffle between the parties, or do you believe Hamilton Duckworth's story at either the inquest or the preliminary inquiry—I have forgotten which—is correct? He denies it to-day."

Having regard to the forewarning words I have read, how can it be said that there is any statement here, or elsewhere in the charge, that the statements made in the earlier investigations were "evidence from the lips of the witnesses alone," "which you have heard while you have been in the jury-box;" or even "the evidence you have heard?"

No difficulty arises so long as we bear in mind the fact that we are not dealing with some mere abstract question of law, that we are dealing with the law applicable to the facts of this particular case only: and that we are pretty sure to be wrong if we attempt to decide this case according to the decision in some other case in which the facts were quite different. If this were a case in which there was merely the testimony of one or more witnesses, exculpating the accused, who had before made statements—whether on oath or not is immaterial—inculpating him, there could be no conviction, there would be no evidence against him: but that is not this case: to shew how very different it is let me again state concisely: (1) the witnesses when giving their exculpatory evidence also gave evidence upon which reasonable men might find their former evidence to be true, and convict the prisoner; (2) there was the evidence of Mrs. Pell proving the truth of their inculpatory evidence; (3) there was the circumstantial evidence upon which alone the prisoner might have been found guilty; and (4) there were but two stories one or other

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of which the jury were bound to find was true, the evidence admitted of nothing else; if the jury credited the last story of the three changeable witnesses, then the story they told at the inquest must have been found by them to be true, and their verdict must have been "not guilty:" whilst, if they found that that story was not true, then there was no alternative, they must find the earlier story of these three witnesses, and the continued story of the witness Mrs. Pell, supported by the circumstantial evidence, to be true, and their verdict must have been, as it was, "guilty."

In these circumstances, how is it possible to say, reasonably, that the Judge might not ask the jury which story they believed; or whether they believed the story which they heard from the lips of these witnesses or the story they told at the inquest or the preliminary investigation? Indeed he might have gone further and have said, "If you do not believe the story of these three witnesses told to-day, then there is no evidence upon which you can believe any other than the story told by them and by Mrs. Pell on the earlier occasions." And it would make no difference if that earlier story had been told to an innkeeper or any one else so long as it was well proved.

I fear these things have not had full weight with those who would disturb this verdict; and disturb it though the only fault which I can find with the charge, in this respect, is that the Judge dealt with these three self-condemned witnesses with such a light hand.

Of the very many cases which have been referred to, there is really one only that has any real bearing upon any debatable feature of this case. Cases decided in the dark ages of the law of evidence, when, among other strange things, a party was not at liberty to discredit his own witness, cannot be very helpful for any purpose in these days, in this Province, when it makes little, if any, difference by whom a witness is called, it makes all the difference what the weight of his testimony is, and where cases are not infrequently decided contrary to the whole of the testimony, the circumstances and the probabilities of the case outweighing it, even when all the witnesses are called by the successful party, as for instance in fraudulent conveyances cases.

The one case, to which I have referred, is that of the burglar John Williams—*Rex v. Williams*, 8 Cr. App. R. 133, 77 J.P.

240, and 29 Times L.R. 188. The prisoner was convicted of murder, and made an appeal quite similar to this appeal; but upon that appeal it was held that when a witness at the trial has varied the date of an event from that given in her depositions, it is correct to tell the jury that it is clear that the event happened on one of the given dates, and that, though they are not at liberty to assume the truth of the statement in the depositions, without further evidence, yet they are entitled on the whole evidence at the trial to decide between the two dates. If that were so in that case, how very much more so must it be in this case, on the question whether the jury should believe the later or the earlier statements of the three witnesses who changed their statements in this case. In that case there was but one witness, and really the whole case turned on what day it was said she saw the prisoner cleaning the finger marks from a weapon—if on the day she named in the preliminary investigation, the circumstances turned the scale against the prisoner; at the trial she changed the day so that the circumstance could not incriminate him; and there was nothing in her evidence at the trial upon which it could be found that the earlier statement was true, yet the jury were held entitled to find which statement was true, upon the whole evidence. In this case there were four witnesses, three of whom only retracted their former like statements, and there was further evidence upon which alone it could be found that the prisoner had shot and murdered Harry Strutt, and that which is of still greater weight, and conclusive, upon the whole evidence but one of two findings was possible, if the story told by these three witnesses at the trial was not believed, the former story told by them must have been, not upon their former statements but upon the whole of the *evidence adduced at the trial only*.

I find that it is not true that the Judge in his charge told the jury that the depositions of the witnesses taken in the earlier investigation were evidence at the trial.

And I hold that, if he had told them that, if from anything said by the witnesses at the trial and from their demeanour, they found that their statements on the former occasion were true, then such statements would be evidence at the trial, evidence from the witnesses' own lips, as the Judge put it, as well as from that other test of truthfulness, their demeanour.

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Also that in any case in which there is other evidence of the fact stated in the earlier statement it is quite proper to ask the jury whether they believe that earlier statement or believe the contradictory statement made before them.

And that it makes no difference whether such contradictory statement is made on examination as an adverse witness or on cross-examination.

In my finding that the Judge did not tell the jury that the depositions, with which these witnesses were confronted, were evidence, I have the silent support of the learned counsel, of much and long experience in the defence of criminal cases, grave as well as minor, who defended the prisoner; and who, although he made another untenable objection, and sought a reserved case as to it, said not a word upon the subject of this appeal, which seems never to have been thought of until two months afterward; and this appeal was not brought on for argument until a few days before the day fixed for the execution of the judgment of the Court. If such counsel, and others acting in the prisoner's interest at the trial, did not, from the charge which they heard, detect the obvious defect which it is now contended there was in it, it is impossible that the jury were misled into the belief that the depositions in themselves were evidence, evidence not at all needed for the prosecution except to disprove the story of these witnesses told at the trial, and to base an examination or cross-examination upon which would lead to proof out of their own lips at the trial of the story told in the depositions.

To say that counsel may have thought the charge objectionable in this respect and have said nothing with a view to a new trial, is quite too far-fetched; why not have it set right then as well as upon a new trial? And, if tricky enough for such a manoeuvre, his purpose would have been better served by making his objection and seeking a reserved case immediately after the jury was discharged.

I can find no justification for disturbing the verdict of the jury or the judgment of the Court upon it: but, as a majority of the Judges who sat upon this case are of a different opinion, in accordance with that opinion, the question asked must be answered in the affirmative, the judgment and verdict must be set aside, and a new trial of the case had in due course; the prisoner to remain in close custody in the meantime.

LENNOX, J.:—The question reserved for the consideration of this Court, by the trial Judge, is: "Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses (Mrs. Nellie Strutt, Mrs. Olive Duckworth, and Hamilton Duckworth), or any of them, given at the inquest, or at the preliminary investigation?"

If this question is answered in the affirmative, it does not, of course, follow that there should be a new trial; that depends upon whether or not, in the opinion of the Court, some substantial wrong or miscarriage was occasioned by the Act complained of (Criminal Code, R.S.C. 1906, ch. 146, sec. 1019); and in determining this not only must the whole charge be carefully considered, but every circumstance of the trial, including the attitude of the prisoner's counsel, as well.

I have had the advantage of reading the able and learned judgment of my brother Riddell, and, so far as it deals with the entire propriety of the course pursued in the production of evidence, I unhesitatingly concur. No question, however, arises upon this appeal as to any improper ruling, or the acceptance or rejection of evidence, by the learned Judge. Improper reception of evidence was, however, the objection taken at the trial, and after verdict; and what the Judge was asked to do, and all that he was asked to do, at the trial, was to reserve a case upon this point. But this was not asked for in the end, and the question is not before this Court.

The Court of Criminal Appeal in England, as pointed out by Lord Alverstone, in *Rex v. Philpot* (1912), 7 Cr. App. R. 140, will not entertain a case for the appellant inconsistent with the defence set up at the trial; but this point was not taken upon the argument, and, perhaps, could not be where the objection is to the Judge's charge. I agree, too, with the argument that where the evidence of a witness or witnesses at the trial is to exculpate the accused, whether called by the Crown or defence, and the truth of the previous statement incriminating the accused is, at the trial, unqualifiedly denied, and *this is all*—where, in other words, there is no other evidence by these or other witnesses at the trial upon the question of guilt—then there is nothing to go to the jury, and if the case is left to the jury a verdict of "guilty"

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cannot be upheld. I also quite agree that it would have been more satisfactory had it been pointed out specifically that proof of previous statements, although upon oath, was not *per se* evidence of the prisoner's guilt; but I cannot bring myself to believe that the singularly lucid, careful, and helpful charge of the learned Judge can rightly be construed as suggesting or implying, at any point, that the previous statements of these witnesses, or any of them, if in fact made, should or might be accepted by the jury as evidence to establish, or tending to establish, the guilt of the accused.

The directly relevant portions of the charge, including what is complained of, have been so fully and carefully dealt with by the Chief Justice that I need not repeat more than a line of it, if any. Olive Duckworth, the prisoner's wife, it is true, was called by the defence, but I may refer to the three witnesses collectively. Without a sentence from the evidence of any one of them, eliminating everything they said at any time, the evidence from other sources was strongly against the prisoner. Or, take their evidence in Court and associate with it their statements of an earlier day, given under the same solemn sanction, and the effect would probably be that the jury would have no faith in what was said by these three.

But it is quite another story if their evidence in Court, unchallenged by their previous depositions, is to be treated as if nothing had gone before—as the evidence of thoroughly reliable witnesses. Called by the Crown or the defence, it mattered not, their purpose was the same; every sentence they uttered at the trial was, or was intended to be, in defence of the prisoner—to prove that Harry Strutt was the aggressor, that Duckworth acted in self-defence, that the discharge of the gun was accidental, and the prisoner innocent.

As to these witnesses, the initial and paramount question for the jury necessarily was: "Are they telling the truth, can you believe them?" In these circumstances, was it reasonable or unreasonable, nay, was it wrong or right, that the Judge, after cautioning the jury not to give heed to anything except what had fallen from the lips of witnesses in Court, and referring to the evidence of these witnesses at the trial and their previous statements, should say to the jury: "Now, it will be for you to come

to a conclusion on these statements, whether the particular witness has told the truth to-day, or told it on another occasion under oath." Surely it was a matter for the consideration of the jury, and one which, in considering their verdict, they were not at liberty to ignore. If the former statements were not true, it is possible, but not probable, that the evidence of these witnesses in Court was true; but, if the repudiated statements were true, the evidence given in Court by other witnesses as well as these three could not be true. Was it not a matter upon which the jury could be—should be—asked to dwell and come to a conclusion on in considering their verdict? But what the Judge emphasised, and very properly, was the cogent chain of direct and circumstantial evidence by reputable and independent witnesses, making it a matter of comparative indifference, so far as the Crown case was concerned, what these three witnesses said outside, except as affecting, as it must affect, their credibility. As a good deal of this part of the charge is set out in the judgment of the Chief Justice, it need not be repeated. It is enough to say that the few lines I have quoted is the strongest peg on which counsel for the defence can hang an appeal, and, as has been so often said, "When a Judge sums up to a jury he must not be taken to be inditing a treatise on law" (*Rex v. Meade*, [1909] 1 K.B. 895); and it has not yet happened that any Judge, even of the most distinguished and experienced in the Empire, has always succeeded in so framing every sentence of his charge as to preclude more or less plausible *ex post facto* suggestions of improvement; and, as it is not likely to happen in the future, it is well to keep actual and probable conditions and limitations clearly in mind. See also *Rex v. Stoddart* (1909), 2 Cr. App. R. 217; *Rex v. Wann*, 7 Cr. App. R. 135.

The prisoner was defended by a very experienced counsel, exceptionally well versed in criminal law. The Judge pointedly asked to have his attention called to any misstatement, error, or omission. The jury returned to the court-room for further instructions before finally determining upon their verdict. There was long deliberation and ample time for thought. It was the duty of counsel to call attention to error, if any, in the charge. Failure to do so does not shut out the prisoner from objecting later on (*Rex v. Wann*, 7 Cr. App. R. at p. 137); but, if an experienced counsel, alert to the interests of his client, can detect

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no flaw in the charge, is it likely that anything that was said was calculated to mislead the jury and prejudice the prisoner? And counsel was on the alert, and this is what happened immediately the jury brought in their verdict of "guilty:"—

"Mr. Robinette: I now make formal application for a reserved case for the opinion of the Court of Appeal on the question, was it proper to allow the evidence of Mrs. Strutt and that of Hamilton Duckworth to go in?" There was still no suggestion of error, or request for a reserved case on the ground of anything said or omitted by the learned Judge. I make no point of this beyond what I have already referred to, namely, that what does not arrest the attention of an able, experienced, and attentive counsel, is not obviously error of a character calculated to mislead the jury or lead to substantial wrong or miscarriage within the meaning of the Criminal Code; and, on reading the charge again and again, and giving it anxious consideration, I think the appeal fails at this point.

But, even if I could agree with the majority of the Court as to this initial question, I certainly cannot come to the conclusion that anything that was said, or omitted to be said, by the Judge, has occasioned substantial wrong or miscarriage, or prejudice to the prisoner, upon the evidence and in the circumstances of this case, entitling him to a new trial.

Section 1019 of the Criminal Code provides that "no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected or something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

There have been several cases decided under this section. Some of them are referred to by other members of the Court, and others are collected in the last edition of Crankshaw, under this section. The most important, perhaps, is *Allen v. The King*, 44 S.C.R. 331, a decision, in so far as it involves a principle of construction, binding upon me, and in which, upon the facts of that case, I cheerfully concur. Indeed the statute leaves little room for diversity of opinion as to the principle upon which

appellate courts must act; but its application is not easy, and each case furnishes a new problem to be determined upon a thoughtful consideration of its own facts. There is no doubt at all that "substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court upon a perusal of the evidence," as was said in the Privy Council in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; and our statute certainly was not intended to substitute trial by Judges for trial by jury in criminal cases; but it is equally clear that sec. 1019 does impose upon each member of the appellate Court the duty of determining affirmatively *as a matter of fact*, upon examination and consideration of every fact and incident of the trial, that "substantial wrong or miscarriage" was occasioned by the act complained of, before he directs or consents to a new trial. The statute is unequivocal and positive. It does not transfer "from the jury to the Court the question of whether the evidence established the guilt of the accused" (*Rex v. Dyson*, [1908] 2 K.B. 454)—he has been tried and convicted—but it does impose upon the Court the duty of determining, pro or con, *the fact*, arising out of the trial, whether substantial wrong or miscarriage of justice has occurred through what happened at the trial, and to direct that the accused shall be *tried again* only if, "in the opinion of the court of appeal," there has been actual and substantial wrong or miscarriage.

It was said in the *Allen* case that there is no distinction between the South Wales, English, and Canadian enactments. Their purpose is undoubtedly the same. There have been a great many cases decided under the Imperial Criminal Appeal Act, 1907, sec. 4 (1). It provides that "the Court of Criminal Appeal on any such appeal . . . shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the Court *may*, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the

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appeal if they consider that no substantial miscarriage of justice has actually occurred."

In *Rex v. Morgan*, 7 Cr. App. R. 63, the conviction was for larceny. The prisoner was not defended by counsel. His wife gave evidence, but, it is said, proved nothing of consequence. The relevant evidence was that of the prosecutrix and the appellant. It is pretty evident that the Recorder prevented the appellant from cross-examining upon one of the two important issues he afterwards submitted to the jury—at all events it was so stated upon argument of the appeal and not denied. The charge was broader than the indictment, and that there was misdirection was not disputed by counsel for the Crown. Lord Alverstone said: "In this case if we had any doubt as to what the jury would have done on a proper direction by the Recorder, we should have quashed the conviction, since the Court is not to re-try cases improperly tried below. But if we are convinced that on a proper direction the jury *must* have come to the same conclusion as they did upon the direction actually given them, then there is no substantial miscarriage of justice, and it is our duty to affirm the conviction, even although the point raised in the ground of appeal is determined in favour of the prisoner. Even though we may consider that the Recorder gave a wholly wrong direction to the jury . . . (if) we are convinced that on the facts a jury properly directed *would* have given the same verdict, we must uphold the conviction." The appeal was dismissed.

In *Rex v. Cohen and Bateman*, 2 Cr. App. R. 197, the Judges of the Court of Criminal Appeal were quite outspoken as to the impropriety of the course pursued by the trial Judge, particularly as to injudicious interruptions, and his instructions to the jury. Channell, J., taking these objections as established, said (p. 207): "The appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty." And at p. 208: "If, however, the Court in such a case comes to the conclusion that,

on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the Judge, not being a wrong *decision* of a point of law." And at p. 210: "We are all of opinion that the summing up was not what it ought to have been. . . . But we all think that the facts were such that if the verdict had acquitted either of the prisoners it would not have been a reasonable verdict." The appeals were therefore dismissed. I have underlined the word "*must*" in the judgments quoted from.

In *Rex v. Stoddart*, 2 Cr. App. R. 217, the Lord Chief Justice, at p. 245, referred to *Rex v. Dyson* (1908), 72 J.P. 272, and said: "We think it is open to consideration whether the word 'must' is not too strong, and whether the proper question is not whether if properly directed the jury *would have* given the same verdict." That this is the proper inquiry is distinctly stated in *Rex v. Norton*, [1910] 2 K.B. 496.

The appeal was allowed in *Rex v. Bloom* (1910), 4 Cr. App. R. 30, upon the ground that the charge as a whole was unfair, the evidence insufficient, and misdirection. The Lord Chief Justice said, at pp. 35, 36: "If the Court could see that *there was substantial evidence* that this man was a party to the stealing. . . . we might come to a different conclusion. As it is we cannot say that the evidence before us is such as to shew clearly that with a proper direction the jury on the facts *could have decided* against the prisoner."

In *Rex v. Monk*, 7 Cr. App. R. 119, Phillimore, J., says (p. 125): "If the jury had been properly assisted, and the evidence properly stated to them, we do not think they would have come to any other decision than that which they did. In these circumstances the conviction must stand."

In *Rex v. Wann*, 7 Cr. App. R. 135, there was lack of corroboration of the girl's story, and the evidence was unsatisfactory, and, to my mind, quite inconclusive. It was at least as consistent with innocence as guilt. The appeal was allowed.

In *Rex v. Yousry*, 11 Cr. App. R. 13, the objections raised were pretty formidable. A document which was clearly not admissible was used on cross-examination with the object of

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creating an impression on the minds of the jury unfavourable to the accused. Coleridge, J., said as to this (p. 18): "Counsel for the prosecution, holding documents in his hands which he cannot put in, has no right to suggest to the jury in any way what they are. The same procedure was adopted in regard to other documents described as being from the consular office in Cairo. They could not be put in, and the jury might easily surmise that these documents were proofs that no such marriage as alleged existed." A still more serious matter was also urged as a ground of appeal. The accused was cross-examined as to a matter not in issue, a purely collateral question, and denied it; but, notwithstanding the rule that on collateral matters the answer is conclusive, the prosecution was allowed to give evidence in reply that the answer of the accused was untrue. Coleridge, J., said: "These questions were properly put to her in cross-examination, and she denied them all . . . But Major Connolly was called to give rebutting evidence, and to give evidence that she had told him that she lived with Kent as his mistress in 1905. Apart from other considerations, that evidence was clearly inadmissible; the question whether she had immoral connection with Kent in 1905 had nothing to do with the issue . . . If we thought that the jury might have been influenced by this to such an extent as to alter their verdict, we should certainly interfere with it. But if we are faced with the fact that here, if a jury did their duty, there could have been no verdict other than that of 'Guilty' . . . In these circumstances, in spite of irregularities, we cannot say that any substantial injustice was done, or that the jury could have altered their verdict. The verdict must therefore stand."

In many respects the facts in *Rex v. Curnock*, 10 Cr. App. R. 207, are very similar to the facts here. The principle of the decision is indistinguishable. Curnock and Norman were charged with stealing and receiving a hose-pipe. In the Police Court, Norman, pointing to Curnock, said: "That is the man who brought the pipe," etc. Curnock promptly replied: "That is a lie." These statements were given in evidence at the trial. During the argument on appeal the Lord Chief Justice, referring to these statements, said: "In *Christie* [above p. 141], it was decided that evidence of a statement made in presence of a prisoner is admissible, but is not evidence of the truth of the facts stated." Counsel replied: "No direction was given to the jury that they

were not to take it as evidence of the truth of the facts," and this was correct. In giving judgment, Lord Reading, L.C.J., said: "We agree with one part of the argument, that it was for the Recorder to direct the jury that, although the statement was admissible in evidence, and in strict law admissible against the appellant, they ought to be careful to discriminate between evidence of a statement by Norman and evidence of the facts stated by him. He ought to have told the jury not to accept the statement made as evidence of the facts stated by Norman. That is important, but under the proviso to sec. 4 of the Criminal Appeal Act, if we are satisfied, notwithstanding the failure to direct as above, that there has been no substantial miscarriage of justice, the conviction should stand. . . . Having considered the facts and . . . explanations, we cannot think that, if the jury had had a proper direction, and had been told to disregard the statements of Norman as evidence of the facts stated, they would have come to any other conclusion than that to which they did come. The appeal must, therefore, be dismissed."

I say nothing, of course, as to the guilt or innocence of the appellant. The only question is, should he be tried again? It has often been said, and might be repeated in this case: "Once the statements are repeated in Court they cannot be effaced from the mind of the jury." It is all true; and no caution, and no explanation of the laws of evidence, that any Judge could give, could make it otherwise. But, all the same, it is express statutory law that inconsistent statements of adverse witnesses may be disclosed, and the preponderance of judicial opinion was only crystallised in the statute, after almost centuries of discussion and with clear apprehension and full notice and knowledge that when disclosed it must sometimes happen, and sometimes with a measure of rough justice too, and none the less, perhaps, because the Judge has learnedly and laboriously dwelt upon the fine distinction between evidence of the statement and evidence of the facts stated, that some alert juryman, *unlearned in the law*, will say: "I can't just make it out, the Judge says it's evidence and it isn't evidence, and there was a mighty lot of fuss about it, so it must be important, but I tell you we know this much anyway, it just fits snugly *with things we all know are true*."

It is quite another matter when the complaint is of improper reception of evidence; there you have something specific and

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tangible, and this marks a distinction in the decisions in a long line of cases. Here it was, at most, merely nondirection, and can it be justly said that what seemed perfectly right to every one at the time led to a result that otherwise would not have been reached? It depends, of course, upon the other evidence; and, visualising all that happened at the trial, and considering all the evidence, the question in every case of the kind must be: "Upon a technically fair trial, with a proper charge, could twelve intelligent and honest jurors have reached a different conclusion?" If, having done this, I am in doubt, I am bound to join in directing a new trial.

Aside from any of the antecedent statements, there was evidence of strained relations or ill-will between the appellant and the deceased, and it matters not very much who was to blame. The appellant, before the 2nd November, "has no use for Harry Strutt," though they lived in the same house, and Mrs. Duckworth tells of a wrangle or jar on the previous Sunday evening, and it is all the more significant because the appellant totally denies it. What is immensely more important, as proving a motive, is that on the morning in question Harry Strutt, to the knowledge of the appellant, assisted Jordan in dumping the appellant's effects from the house, and the appellant went away in an angry and excited mood. The shooting occurred immediately upon his return, and it is sworn to by Lloyd Duke, whose honesty was not questioned, and who fixed the hour by being at home from school at noon, and the date from hearing of the tragedy that evening, and speaking of the sale, that the appellant purchased twelve 44 calibre cartridges from him during this absence. It was in evidence that the appellant owned or was in possession of a 44 calibre rifle, that his initials were upon the stock, that he shewed it to George Strutt, and the initials were talked about, that he offered to sell it to James Clayton, that the rifle was in the bedroom downstairs (Mrs. Duckworth's) that morning, and that when he returned home shortly after noon, after having purchased these cartridges, without speaking to anybody, he immediately went into the bedroom (Mrs. Strutt's), that Harry Strutt was then upstairs with his sister Mrs. Pell, and when the appellant came from the bedroom he went up there at once, and the shot that killed Strutt was fired almost immediately, if not immediately, on his getting there. The story of

Mrs. Pell, if accepted by the jury, was in itself, without more, clear evidence of murder. She was not shaken on cross-examination in any way, and to my mind, and possibly in the opinion of the jury, it was all the more convincing in that she made no attempt to make it perfect in detail. She did not pretend to know all or to have seen everything. She did not frame the picture or hang it in the best light, but what she revealed was enough, if believed, to disclose the nature and quality of the appellant's act.

And the appellant's evidence surely helped. He swore that the shooting occurred in this way. His brother, Hamilton Duckworth, was standing at the window, and, just a little before the shot was fired, Hamilton jumped forward to the appellant saying "*What are you doing?*" (whatever light that might convey to the jury), "and snapped me back *with the gun*, and the gun *apparently* went off." This was to his own counsel, and it may not have appeared to him quite a satisfactory answer; at all events he asked: "Was he (Strutt) *quite clear of the gun* when you (were?) pulled away?" And he answered, yes, he was quite clear of it. If this is true, and it is the appellant's own evidence, what inference would a competent jury inevitably draw? Self-defence? Two men facing each other. One, the appellant, with a gun, the other near at hand but defenceless and clear of the gun, and another man to avoid bloodshed jumps upon the armed man saying, "What are you doing?" and pulls him further back. It needs no words, *res ipsa loquitur*.

The appellant did not state what became of the cartridges he bought or why he went into the bedroom before going upstairs, both likely to be regarded by the jury as pertinent questions. He does not account for the gun after the shooting, but Mrs. Pell says he carried it downstairs.

The appellant created the atmosphere of the trial after his arrest by declaring that he had no rifle, was not at the house, and knew nothing of the shooting, etc. "Circumstances alter cases," and statements and evidence for the defence, found to be false, go far to establish a charge of guilt. There can be no reason suggested why the jury would doubt the truthfulness of Duke or Marshall or George Strutt or Dr. Berwick or Boyd or Brown or Clayton.

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If the jury believed George Strutt as to the ownership of the rifle and the marks upon it, and Clayton as to the offer to sell it, or Duke and Strutt as to the cartridges, or Marshall, Boyd, and Brown as to confessions, and there are many other matters of consequence in conflict, they would be forced to conclude that the appellant and his wife gave false evidence, and that the appellant fabricated the account of his movements on the afternoon of the day in question for the obvious purpose of misleading the Crown, and presumably for the purpose of screening himself by setting up an alibi—and what finding could be expected from reasonable men except a verdict of guilty?

The whole setting of the case is gravely unfavourable to the appellant. He knew at least that Strutt was shot, and says that the wounded man stood motionless and quiescent for five minutes in his sister's arms, and he too did nothing during all this time. That he was preparing to put up the stove, that it was an immediate necessity, that he found everything ready, but there is no suggestion as to why he changed his mind. That he remained upon the property in all for ten or fifteen minutes, but he made no inquiry as to the condition of his victim, and he did not know when he drove away that he was dead. That, without preparation or previous intent, and leaving all his belongings outdoors, he took his family to Smith's, and, turning back in the direction of his house, if his wife's recollection is to be relied on (was it for the rifle?), worked his way over to Turnbull's and settled down to work, although he had arranged with Turnbull at noon *not to go to work that afternoon*, but, instead, to move into a house urgently needed, and that Turnbull had obtained for him at his urgent request. It is in evidence that he drove over in a cart, that the wheel-marks were traced, that at a certain point the marks diverged to the side of the road, that he was seen by two witnesses driving along this highway, and that the rifle, the rifle with initials seen by George Strutt, the rifle he offered to sell to Clayton, the 44 calibre rifle which is said to have killed Henry Strutt, whoever owned or had it, was found within twenty-four hours concealed near the roadside along which the appellant had driven, and just opposite where the wheels of his cart turned off from the beaten path.

I may be wrong; any one may be wrong in such cases; but, assuming misdirection or nondirection, and I have expressed my

view as to this, with the utmost respect for the weighty contrary opinion of a majority of the Court, and realising very clearly that in cases of substantial doubt there should be a new trial, yet, whatever may be argued as to the charge, and all charges fall short of theoretic perfection, I am "convinced that upon a proper direction the jury would have come to the same conclusion as they did," or, as stated in another case, that "the only reasonable and proper verdict would be one of guilty. . . . that if the verdict had acquitted the prisoners (prisoner) it would not have been a reasonable verdict," or, to quote from yet another decision, that "if the jury had been properly assisted (assuming they were not), and the evidence properly stated to them, they would not have come to any other conclusion than that which they did;" and I am, therefore, of opinion, whatever may be urged on the basis of "poetic justice," or fair trial in the abstract, that nothing happened at the trial occasioning "substantial wrong or miscarriage;" and there should not be a new trial.

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New trial ordered; MEREDITH, C.J.C.P., and LENNOX, J., dissenting.

[APPELLATE DIVISION.]

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May 22.

BENSON v. SMITH & SON.

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Mechanics' Liens—Public School Lands—Erection of School House—Liens of Sub-contractors—Liability of Lands—Status of Assignee for Benefit of Creditors of Contractor—Mechanics and Wage-Earners Lien Act, secs. 2 (c), 3—Public Schools Act, secs. 55, 73—Time for Registering Claim of Lien of Sub-contractor—Work Done after Materials Placed in Building—Concurrence of Owner, Contractor, and Sub-contractor—Secs. 16 and 22 (2) of Lien Act.

In actions brought by sub-contractors against the contractors for the erection of a public school building upon public school land, the assignee of the contractors for the benefit of creditors, and the school trustees, to enforce liens under the Mechanics and Wage-Earners Lien Act, it was *held*, that the assignee had the right to contend that the land was not subject to such liens, although the point was not raised by the trustees.

(2) That land held by public school trustees for public school purposes is within the provisions of the Act.

Sections 2 (c) and 3 of the Mechanics and Wage-Earners Lien Act and secs. 55 and 73 of the Public Schools Act considered.

(3) It being objected that the lien-claim of one of the sub-contractors was not registered in time, it was *held*, that the question when the time finally

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ran out was mainly a question of fact; and, upon the facts, though there was strong suspicion that the architect's demand upon the sub-contractors that some further work should be done by them upon doors which had been fitted into the building, was acceded to merely to retrieve the right of lien lost by delay in registration, yet, the additional work having been done with the concurrence of the contractors, sub-contractors, and owners, through the architect, the time for registration did not run out until thirty days after the completion of the additional work, and the registration was in time.

Sections 16 and 22 (2) of the Act considered.

APPEAL by the defendant Mortimer, assignee for the benefit of creditors of the defendants Smith & Son (contractors), and cross-appeal by the plaintiffs the A. B. Ormsby Company, from the judgment of the Local Judge at Welland in actions to enforce mechanics' liens against lands upon which a school-building had been erected.

The Local Judge upheld the validity of the liens as against the contention that a lien was not effective in respect of public school lands; but discharged the claim of lien of the A. B. Ormsby Company because, in his view, it was registered too late.

April 28. The appeal and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., for the appellant Mortimer, argued that the lands in question, being held by public school trustees for school purposes, were not within the provisions of the Mechanics and Wage-Earners Lien Act. He referred to *General Contracting Co. v. City of Ottawa* (1910), 1 O.W.N. 911, 16 O.W.R. 479; *King v. Alford* (1885), 9 O.R. 643; *Crawford v. Tilden* (1907), 14 O.L.R. 572; *Mersey Docks Trustees v. Cameron* (1865), 11 H.L.C. 443; *London County Council v. Churchwardens of Erith*, [1893] A.C. 562, 585; *Connely v. Havelock School Trustees* (1912), 9 D.L.R. 875

A. C. Kingstone, for the plaintiff Benson, referred to *Hazel v. Lund* (1915), 25 D.L.R. 204, 32 W.L.R. 818; *Lee v. Broley* (1909), 11 W.L.R. 38; *Moore v. Protestant School District of Bradley* (1887), 5 Man. L.R. 49; *Coomber v. Justices of Berks* (1883), 9 App. Cas. 61.

V. H. Hattin, for the A. B. Ormsby Company, respondents on the main appeal, referred to the judgment of Martin, J.A., in *Hazel v. Lund*, 32 W.L.R. at p. 831. On the cross-appeal, he referred to *Summers v. Beard* (1894), 24 O.R. 641; Wallace on Mechanics' Liens, 2nd ed., p. 385; *Hurst v. Morris* (1914), 32

O.L.R. 346; *Anderson v. Fort William Commercial Chambers Limited* (1915), 34 O.L.R. 567; *Day v. Crown Grain Co.* (1907), 39 S.C.R. 258; *Deldo v. Gough Sellers Investments Limited* (1915), 34 O.L.R. 274.

McKay, in reply.

May 22. MEREDITH, C.J.C.P.:—In the opening of this appeal, I was under the impression that the case was one of two independent contractors, the one having maintained his lien under the Mechanics and Wage-Earners Lien Act, and the other, although he had lost his lien, appealing against a judgment, in favour of the one who had maintained his, and appealing upon the one ground that such land as the land in question cannot be subject to any such lien; and so appealing although the land-owners make no such objection, nor any other objection, to the judgment appealed against; and, under that impression, I challenged the appellant's right to appeal: but such is not the case: the appellant's assignors were the contractors with the land-owners, the respondents were their sub-contractors, and the appellant is an assignee of the contractors, for the benefit of their creditors, and, as such, is a party to this action; and has a right of appeal, no matter what stand the land-owners may have taken, or may take, on the question whether or not the enactment in question is applicable to their land, land which is held by them, as public school trustees, for public school purposes only. The effect of the lien is to give the respondents, practically, a charge upon money due from the land-owners to the appellant, and so give them priority over other creditors of his assignor, which they should not have if the land cannot be charged with any such lien. The land-owners have really no interest in the controversy: they owe so much money to the contractors, apparently more than enough to pay all existing liens, and so are substantially unconcerned in the question to whom it should go, being able and quite ready to pay.

Then, having such right of appeal, the one ground urged in support of it is: that land held as the land in question is, by public school trustees for public school purposes, is not within the provisions of the Mechanics and Wage-Earners Lien Act.

But why should it not be? From the standpoint of the mechanic and wage-earner there can be no reason why it should not

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be: nor can any very substantial reason be advanced against it in the public interests. Greater reason, from that standpoint, could be advanced against the protection, which the enactment affords, being given in regard to land plainly within its provisions.

It is made very plain in the Act that it was not meant to be applicable to private property only; nor to such property only as is exigible under ordinary writs of execution: Its wide character is indicated by the words "shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished," contained in sec. 2(c): and in the exception, to that wide scope, contained in sec. 3, in these words: "Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon."

Is there greater reason for excluding public school houses, than for excluding court houses, gaols, hospitals, churches, and railway stations?

But, having expressed my opinion on this very question some years ago, in the case of *General Contracting Co. v. City of Ottawa*, 1 O.W.N. 911, 16 O.W.R. 479, there is no excuse for saying more now upon the subject, than this: that all the later cases in the other Provinces hold public schools to be within such an enactment.

The appeal must be dismissed.

There is also a cross-appeal.

The appellants in it were, at the trial of the action, held to have lost their lien by failing to register it within the time-limit of the enactment.

This appeal is opposed by the assignee of the contractors only; and his right to oppose it is equal to his before mentioned right to appeal against the successful lien-holders: and, in addition to the ground upon which these appellants failed at the trial, he urges the point made in his appeal against the respondents in it—that the land is not subject to the provisions of the Act in question; but that point fails, for the reasons I have given.

So the only question is: whether the registration of the lien was too late.

The contract was to supply doors for the school in question: and they were supplied in August: and so if time—thirty days—ran from the day of the delivery of the doors by these sub-contractors to the contractor or from the day when they were placed in the building, the lien is lost: but towards the end of the year the architect of the building insisted upon some changes being made in them to comply with his requirements, and eventually they made them, these changes being made early in the month of January following: and, if that circumstance gives a new starting-point, or be considered the starting-point, from which the 30 days are to be counted, then, admittedly, the lien was registered in time, and effect should have been given to it, instead of dismissing the claim made upon it, as the Local Judge did.

The provisions of the Act applicable to the case are contained in the following words of sec. 22 (2): "A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days after the furnishing or placing of the last material so furnished or placed:" and in sec. 16, which protects the sub-contractor until the material is placed in the building: this provision having evidently been made, in the year 1910, for the purpose of settling a point much discussed in the recent case of *Kalbfleisch v. Hurley* (1915), 34 O.L.R. 268, and some of the cases referred to in it.

The question when the time began to run, or, perhaps better stated, when it finally ran out, must be mainly a question of fact: and the most material facts of this case are: that the contract for the furnishing of the doors in question is in writing, dated the 21st July, 1915; and under it the sub-contractors were to deliver to the contractors "soon" the fourteen doors in question, the dimensions of which are set out in the writing, "with frames and trim, no glass," free on board at Niagara Falls, for \$350; and the sub-contractors were to have \$60 more if they "erected" the doors, the contractors furnishing the "hardware." A plan of the doors, shewing details of construction, was prepared by the sub-contractors and sent by them to the contractors, and was received by the contractors, approved by them, and by them returned so approved to the sub-contractors, with a letter giving "the measurements for the openings;" the doors were made accordingly, and they and the frames and trim were delivered to the contractors, "free on board at Niagara Falls," in the latter part of

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the month of August; and were accepted by them, and by them, soon after, were placed in the building, they having rejected the offer of the sub-contractors to do that work also for the additional \$60: and all this was done in due course without any kind of objection being made to, or fault found with, the work of the sub-contractors: and so it must have appeared to both contractors and sub-contractors that the time within which a lien, for this material, should be registered, began to run then: the exact time has not been stated, but the doors must have been in place, completed, some time in the month of September.

If the case stood thus, there could be no doubt that the lien was lost; that the thirty days expired in October at the latest: the lien was not registered until the following month of January: and that would be so even if the doors had not been made according to the contract in some particulars, for, the purchasers having accepted and used them, an action would lie for the price, which could be recovered, less a proper reduction for the defect.

But, in the month of October, some time after the doors had been placed in the building, and left there as completing the contractors' contract in that respect, objection was made to four of them, that the windows in them were not large enough. The objection came from the architect, under a clause in the contract of the contractors with the owners, that the work should be subject to the approval of the architect. To this objection the sub-contractors, who were demanding payment of the \$350, answered that they had sent details to the contractors and they had "O.K.'d" them: and the architect's reply was: that his office was the proper place to have had them "O.K.'d:" a proper reply if he had been dealing with the contractors; but he was not, he was writing to sub-contractors, over whom he had no control except through the contractors. But, eventually, the contractors taking the ground too that the sub-contractors should have obtained the approval of the architect, work was done, early in January, upon the four doors, to the satisfaction of the architect, by the sub-contractors, as part of their obligation under the written contract; for which they have not charged nor sought to charge anything beyond the contract price: and immediately after this work was done, and done without removing the doors from the building, the lien in question was registered.

Although it seems to me that the architect was wrong in his contention, and that the persons alone answerable for the neglect to get his approval regarding the doors were the contractors, and although I entertain the strongest suspicion that the architect's contention was acceded to mainly to retrieve the right of lien which they had lost by neglecting to register a lien in October, there was the concurrence of contractors, and sub-contractors, and owners, through the architect, in treating the sub-contract as incomplete and in having it completed early in the month of January; a course which, it seems to me, other creditors of the contractors could not prevent and cannot successfully contend is not binding upon them: and it may be added that the assignee of the contractors is also secretary of the School Board, owners of the building, and, as such secretary, took part in the demand upon the sub-contractors regarding the four doors objected to, and was assignee, for the benefit of creditors of the contractors, in January, when the work in question was done.

This conclusion I reach without, I hope, taking too narrow a view of the case, without having my mind too much centred upon protection of contractors and sub-contractors whose money, work, and goods are added to the land which they desire to hold as security for their outlay upon it. It is quite too narrow a view of a case, such as this, to say, as is said in some of the text-books, "Give the lien because it cannot harm the owner, he has to pay only that which he contracted to pay;" a saying well enough in theory, but very far astray in actual experience, as nearly all the cases upon the subject prove: when the Courts differ, as they sometimes do, as to the meaning and effect of the Act, should we assume that no owner can or need make a mistake; or shut our eyes to the fact that circumstances sometimes compel an owner to pay more than the Act protects him in paying—that or have the contract abandoned to his great inconvenience and greater loss? And this is but a beginning of a statement of the difficulties, worries, and dangers of an owner in dealing, as he may be obliged to deal, with questions of lien or no lien, conflicts between contractors and sub-contractors even to the third and fourth degree: and, quite apart from the owner and his statutory protection, the rights of common creditors, and judgment, execution, attachment, and receiving order, creditors, as well as assignees, who

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have no protection provided by the Act for them, are entitled to as much consideration as those of any one else: and much care should be taken that sympathy for the "mechanic and wage-earner," and the "it does not hurt the owner anyway" feeling, do not rob them of their rights behind their backs. We shall do best if we give to the plain words of the Act their plain meaning always.

Not without some hesitation, I am of opinion that the Local Judge erred as to the claim in question in this appeal, and would allow it, with the usual consequences.

LENNOX, J.:—The learned Local Judge at Welland, upon the trial of these actions, decided that the plaintiff is entitled to a lien, under the Mechanics and Wage-Earners Lien Act, upon a certain public school property in the city of Niagara Falls, for the sum of \$1,018.54; and that the A. B. Ormsby Company, claimants in the second action, are entitled to recover \$450 from Smith & Son, for material supplied in the erection of the school house, but are not entitled to a lien upon the school property. The defendant Mortimer, a party in both actions, assignee for the benefit of creditors, appeals against the first judgment upon the ground that the Mechanics and Wage-Earners Lien Act does not apply to school property, and opposes the Ormsby appeal.

The A. B. Ormsby Company appeal against the judgment in the second action, claiming that they registered their lien in time, and are entitled to have a lien upon the school property in question for the amount of their claim.

Section 8 (1) provides that the lien shall attach upon the estate or interest of the owner in the property mentioned in sec. 6. Clause (c) of sec. 2 defines "owner" as including a body corporate or politic, a municipal corporation, and a railway company. It will be surprising, and I think unfortunate, if this section has to be construed as contended for by Mr. McKay; but I can find nothing in the language of the section, or in the object or scope of the Act, or in any of the cases referred to, to justify any such construction. *General Contracting Co. v. City of Ottawa*, 1 O.W.N. 911, 16 O.W.R. 479, does not help much either way, but, as far as it goes, supports the existence of the right of lien.

Clauses (d), (e), (r), and (u) of sec. 73 and sec. 55 of the Public Schools Act, R.S.O. 1914, ch. 266, are relied on. Section 73

imposes upon the School Board the duty and obligation of providing for public school education generally, including proper and adequate accommodation for all children of school age within the school section; and it is not to be readily presumed that the Legislature intended that school houses were to be built, but that the contractors, mechanics, material-men, and wage-earners, were to be left unpaid. It is said that school property cannot be sold under an execution. I need not pause to determine whether this is the law or not; if it is, it is an argument against the probability that the Legislature intended to exempt school properties from the beneficent provisions of the Lien Act. The parallel difficulty about municipal properties may have been the reason for making the Act applicable to "a municipal corporation." The reference to sec. 55, if I may say so with respect, indicates the poverty of available argument in support of the defendant's appeal; it is of course hardly necessary to say that Mr. McKay made the best that could be made of a difficult situation.

It was decided in *Scott v. Burgess and Bathurst Union School Trustees* (1859), 19 U.C.R. 28, that the land there in question could not be sold under an execution. The land there was a gift, and the conveyance was expressly for school purposes, and the land was to revert to the donor in case it ceased to be so used. The judgment of the Court, however, was not based only or even mainly upon this circumstance. The plaintiff's judgment was for a debt directly contracted by the trustees as such; and, as was pointed out, there was ample provision in the school law for raising the money for its payment by assessment, as there still is; and, in case of wilful neglect of the trustees to exercise their powers, they became personally liable upon their contract.

But the Mechanics and Wage-Earners Lien Act is a special provision intended, amongst other things, to secure payment to wage-earners and others who have no direct contract with the trustees, and should receive such fair and liberal construction as will give effect to its obvious intent.

In *Connely v. Havelock School Trustees*, a decision of the Supreme Court of New Brunswick, 9 D.L.R. 875, Chief Justice Barker said: "The answer set up by the school trustees is that they, as well as their property, are exempt from the operation of the Lien Act, not by express words, but as a legal result of their holding and using the property as trustees for the benefit of the

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public, without profit to themselves, and as a part of a general public educational system for the Province, in effect carried on as a department of the Provincial Government. The Lien Act certainly does not bind the Crown. . . . The Mechanics Lien Act was passed in the interest of workmen and contractors so as to afford them some security by way of a lien on the buildings which had been created by their labour. If the principle is worth anything, it is equally valuable in the case of a school building paid for by an assessment of the inhabitants of a school district as in the case of an individual taxpayer erecting a building for his private purposes." The judgment of a County Court Judge allowing a lien was sustained by the full Court.

It is much easier to conclude that there is a lien upon school property in Ontario. "Owner," by sec. 2 (c) of R.S.O. 1914, ch. 140, "shall extend to any person, body corporate or politic, including a municipal corporation." In the Revised Statutes of New Brunswick, 1903, ch. 147, as pointed out in the judgment quoted, there is nothing in "express words"—a corporation is not mentioned.

King v. Alford, 9 O.R. 643, and *Breeze v. Midland R.W. Co.* (1879), 26 Gr. 225, were both decided before the amendment of the statute, and are clear authorities to shew that, in the absence of express and unequivocal language, a part of a railway, upon which work has been executed, could not be taken as included in the provisions of the Mechanics Lien Act then in force. In 1907, when *Crawford v. Tilden*, 14 O.L.R. 572, was decided, the Mechanics and Wage-Earners Lien Act in force was R.S.O. 1897, ch. 153, and, by sec. 2 (3), "owner" expressly extended to and included a railway company, but the railway in question was a Dominion railway, and in the terms of the British North America Act declared to be "a work for the general advantage of Canada;" and the decision was, that the Ontario Legislature had no jurisdiction over it.

I have not found any assistance from a perusal of English rating cases such as *Mersey Docks Trustees v. Cameron*, 11 H.L.C. 443, and *London County Council v. Churchwardens of Erith*, [1893] A.C. 562, as to the construction of our Lien Act. The principle of these cases is brought down pretty well to date by the judgment of the House of Lords in *Liverpool Corporation v. Chorley Union Assessment Committee*, [1913] A.C. 197.

The word "owner" in the British Columbia Act includes any person having a legal or equitable interest in the land, and is not expressly made to include a corporation, as in our Act. "Person," however, includes "a body corporate." In *Hazel v. Lund*, a British Columbia case, decided by the Court of Appeal, 25 D.L.R. 204, it was held that the Act applies to school property; and so the Manitoba Act, in *Moore v. Protestant School District of Bradley*, 5 Man. L.R. 49.

I need not pursue this matter further. If the provisions of a statute are fairly capable of two interpretations, an interpretation which will work for justice rather than one which will bring about an injustice is to be adopted. Here, however, the respondents are not driven to depend upon this argument. Upon the ordinary and obvious meaning of the language of the statute, school properties are subject to the lien as declared by the trial Judge. This appeal should be dismissed with costs.

The A. B. Ormsby Company appeal from the judgment of the Local Judge declaring that they are not entitled to a lien upon the school property, and directing that their claim for lien, registered under sec. 17 of the Act, be discharged. The facts are very simple and are not in dispute. The contractors, Smith & Son, entered into a contract with the appellants to furnish 14 doors for the school-house, of specified outside dimensions, with glass panels, and to be of a character satisfactory to Mr. Porter, the architect of the building, for the sum of \$350. The doors were delivered to Smith & Son on the 27th August, 1915. Until the 6th October, the appellant company presumed that the doors were satisfactory. They were then notified that the architect objected that the glass panels were not large enough and would not admit sufficient light. Payment was refused, and negotiations ensued. The company offered to alter the doors in several ways—one offer was to substitute prismatic glass—but the architect rejected all of these proposals. Matters continued in this state until January, 1916. On the 6th January, the company received a letter of complaint from the trustees, and an arrangement was thereupon come to with the architect that the company would alter some of the doors by substituting larger sash and increasing the lighting area; and this work was completed to the satisfaction of the architect on the 8th January. Smith & Son

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made an assignment on the 3rd January, and there was then considerable work to be done under the main contract, which, I understand, was subsequently done by the trustees and charged to the contractors. It is not suggested, and could not be successfully contended, that the alterations made by the company in January were not made in *bonâ fide* compliance with the terms of their contract to furnish doors satisfactory to the architect, and by reason of what he insisted upon having done. It was an entire contract, at a fixed price.

It is admitted that if January is to be regarded as the date when the work was completed the claim for lien was registered in time. I think the company are clearly entitled to a lien upon the land in question. The time limited by the Act does not begin to run until there has been such performance of the contract as would enable the contractor to maintain an action for the full amount agreed to be paid: *Day v. Crown Grain Co.*, 39 S.C.R. 258; *Crown Grain Co. Limited v. Day*, [1908] A.C. 504. The work in January was proportionately important, but it is not essential that it should be: *Hurst v. Morris*, 32 O.L.R. 346. Down to October, the company thought the work was satisfactory, and the matter was in negotiation until January: *Anderson v. Fort William Commercial Chambers Limited*, 34 O.L.R. 567.

This appeal should be allowed with costs.

MASTEN, J., agreed with the judgment of LENNOX, J.

RIDDELL, J., agreed in the result.

Appeal dismissed; cross-appeal allowed.

[BOYD, C.]

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May 25.

MARTIN V. JARVIS.

Vendor and Purchaser—Agreement for Exchange of Properties—Difference in Value—Payment in “Negotiable Paper or Cash”—Uncertainty as to Terms—Incompleteness—Oral Evidence—Admissibility—Enforcement of Agreement—Statute of Frauds.

By a written agreement for the exchange of properties between the plaintiff and defendant, the plaintiff was to pay to the defendant the excess in value over the plaintiff's property of the defendant's property, in “negotiable paper” or cash. The defendant registered a conveyance of land made in his favour by the plaintiff, pursuant to the agreement; and the plaintiff sought to have the conveyance and registration set aside, on the ground that the agreement was void for uncertainty, not binding on the plaintiff as dealing with an interest in land, and not complying with the Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5:—

Held, that the words quoted had no absolute fixed meaning; parol evidence to explain the position of the parties and of the subject-matter and surroundings was admissible.

Bank of New Zealand v. Simpson, [1900] A.C. 182, 187, followed.

Having regard to the evidence, the “paper” contemplated was something held by the plaintiff on which another was liable or which was secured substantially as by mortgage on land—the mere promissory note of the plaintiff would not be sufficient; in so far as the plaintiff was unable to supply proper and substantial “negotiable paper,” he was to pay cash.

The terms were reasonably certain, and the defendant was entitled to enforce the agreement.

There is a growing inclination in the Courts to carry out contracts which are complete so far as essentials are concerned, and yet leave something (e.g., as to manner of payment) to be adjusted between the parties.

Review of the authorities.

Reynolds v. Foster (1912-13), 23 O.W.R. 613, 933, 4 O.W.N. 448, 694, not followed.

McDonald v. Murray (1883-85), 2 O.R. 573, 11 A.R. 101, and *Ozd v. Coombes* (1884), 28 Sol. J. 378, followed.

ACTION to set aside and vacate a conveyance of land by the plaintiff to the defendant and its registration by the defendant, on the ground that it was made without consideration, and that it was fraudulently obtained and registered.

There was an agreement between the parties for an exchange of properties (lands and chattels). Upon the valuation of the properties, there was an overplus of \$8,996 in favour of the defendant, and for this, by the agreement, the defendant was to take from the plaintiff “negotiable paper or cash.”

The defendant counterclaimed for specific performance of the agreement.

The action and counterclaim were tried by BOYD, C., without a jury, at Guelph.

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R. McKay, K.C., for the plaintiff.

H. Guthrie, K.C., for the defendant.

MAY 25. *Boyd, C.*:—This action is brought to set aside and vacate a conveyance of land and its registration by the defendant, on the ground that the deed was made without consideration, and that it was fraudulently obtained and registered. At the trial, on the allegations of fact the plaintiff was completely overborne by opposing and satisfactory testimony. The case was launched originally as upon a valid contract of sale by which the defendant was to take in exchange the plaintiff's land, being a farm called "Jane-field," near Guelph, for land owned by the defendant at Port Huron, known as the "Canning Plant." Upon that footing, an interlocutory injunction was obtained, restraining the defendant from dealing with the land and chattels sold therewith. On motion to continue the injunction, it was made to appear that the defendant had a good title to the Port Huron property, and was ready and willing to carry out the contract, and had not refused to complete, as was alleged in the statement of claim and affidavits. Thereupon the injunction was modified by my brother Middleton—as to the land the plaintiff was left to his *lis pendens*, and as to the chattels he was to give security to answer in damages in case his interference had injured or would injure the defendant.

Upon this new aspect of the contention being developed, the plaintiff, after the statement of defence had been delivered, amended his claim under Rule 127, setting up no longer a good contract, but "an alleged agreement," and claiming that the same was void for uncertainty, not binding on the plaintiff as dealing with an interest in land, and not complying with the Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5. In his reply of the same date, the 4th May, the plaintiff indicates more clearly the point of complaint, thus: "The said agreement is void and not binding on the plaintiff, among other things for uncertainty in that no period of time is specified for maturity of the negotiable paper mentioned in the agreement." This was indeed the one point argued by Mr. McKay, for the plaintiff, that the agreement was too vague for specific enforcement because of the uncertainty and indefiniteness of the expression in this term of the contract,

viz., that the defendant was to take from the plaintiff "negotiable paper or cash for the balance due on the property" of Jarvis, the defendant.

Waiving the anomalous condition of a plaintiff using the Statute of Frauds as a weapon of attack, and assuming that it is rightly set up, the point arising on that statute, or it may be apart from that statute, on the ground of infirmity inherent in the terms of the contract—i.e., that it is so vague as to be inoperative—this point appears to be the only serious question in the controversy.

The plaintiff calls himself a farmer, but the evidence shewed that he knew more about dealing in and exchanging lands than he did about cultivating the soil. Both parties are shrewd, intelligent men of business, and knew what they were about in exchanging properties. Prices were ascertained of the various articles purchased with the Port Huron place, and the total, including land, was \$17,466. The plaintiff's farm and some commodities specified to go with it were taken over at \$8,500, leaving the balance to be paid in negotiable paper or cash at \$8,966. There was much discussion as to how this balance was to be met. The plaintiff then held two documents which were treated as negotiable paper, and which were to be applied on the balance. One was a promissory note for \$1,650 made by Westbrook and held by the plaintiff, and the other was spoken of as the Black mortgage, for about \$1,900. The plaintiff, at the defendant's instance, made inquiries as to these, and on report that they would be taken by the bank it was settled that this "negotiable paper" should be applied in part payment of the balance. This would reduce the balance to be met by the plaintiff to about \$5,400. The plaintiff stated more than once that he would pay the rest remaining due in cash. I think it is well proved that the plaintiff knew that what the defendant wanted was cash or the equivalent of cash, and the plaintiff knew that this was essential to the carrying out of the contract, having regard to the state of the Port Huron title. The plaintiff knew at an early stage and before entering into the formal contract of sale, dated the 21st October, 1915, that the defendant had an option to purchase from the Sherman estate—in which the title was vested—between \$5,000 and \$6,000 in cash was needed to clear the Sherman claim, and on payment of this the Shermans

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were ready to convey. This state of the title the plaintiff was satisfied with; and, having looked over and examined the place, he purchased. The plaintiff was told again and again that the negotiable paper must be such as would be taken by a bank, and it was never suggested till after the time for completing the transaction on the 5th November, that the plaintiff could or would give only his personal note for the ultimate balance. Such a note being tendered was refused *instantly* as not being according to contract, and it was upon this crisis arising that the defendant gave directions to have the deed of the Janefield property registered, which he had the right to do, according to the evidence of the lawyer who had prepared the conveyance and seen to its execution, on the 4th November. The conveyance was held subject to the defendant's direction, and he directed it to be registered, which was done on the 11th November. The real crux, according to all the evidence, was the inability of the plaintiff to make payment according to the mutual understanding of the parties.

Now, these words used in the contract, "negotiable paper or cash," are as to the former not of inflexible import. They have not an absolute fixed meaning, not susceptible of explanation. For the interpretation of all writings, parol evidence may be received to explain the position of the parties and of the subject-matter and other surroundings, so that (as it has been said) the Court may be placed in the situation of the parties themselves—may see with their eyes, and may understand the force and application of the language employed by them. Then, if the terms, so interpreted, are reasonably certain, it is enough to justify the interposition of the Court. See Pomeroy on Contracts, 2nd ed., pp. 226, 227, 228. To the same effect, Mr. Justice Fry says: "The certainty required must be a reasonable one, having regard to the subject-matter of the contract, and the circumstances under which and with regard to which it is entered into:" Fry on Specific Performance, 4th ed., p. 164. The final word is spoken by the Privy Council in *Bank of New Zealand v. Simpson*, [1900] A.C. 182, where Lord Davey says: "Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about" (p. 187).

Mr. McKay, in his able argument, urged that the alleged uncer-

tainty was within the rule laid down in some of our own cases as to mortgages to be given for the balance of purchase-money. Thus in *Reynolds v. Foster* (1913), 23 O.W.R. 933, 4 O.W.N. 694, the stipulation was, that the balance of the price, \$4,000, was to be secured by a mortgage upon the land in question. It was held that the time for payment should have been specified and set out in the contract. The vendor wished the mortgage to run three years, and the purchaser would have been content with five; but the holding of the Court was, that the parties intended that it should be a matter of agreement between them, and, failing such agreement, the contract was left at loose ends in an important and essential detail, and could not be specifically enforced. This case, as decided originally in the same way by Mr. Justice Teetzel, *Reynolds v. Foster* (1912), 21 O.W.R. 838, 3 O.W.N. 983, was followed by my brother Kelly in *Clement v. McFarland* (1912), 23 O.W.R. 613, 4 O.W.N. 448.

In *Reynolds v. Foster*, the appellate Court refers to opinions expressed in *McDonald v. Murray* (1883), 2 O.R. 573, 581, as plainly not in accord with the conclusion arrived at in *Reynolds v. Foster*, but treated as mere expressions of opinion. They are only adverted to in order to be overruled. In *McDonald v. Murray*, 2 O.R. 573, the balance of \$15,000 was to remain on mortgage, and it was contended that it was uncertain because no time for payment was specified. On this contention the expressed opinion of Wilson, C.J., was, that he did "not consider the contract to be void or to be incapable of effect being given to it; and if possible contracts should be maintained according to the intent of the parties, if the Courts can do so by placing a reasonable construction upon them" (p. 581). Galt and Osler, JJ., concurred in the result.

In appeal, *McDonald v. Murray* (1885), 11 A.R. 101, Patterson, J.A., says it is "anything but plain how this mortgage matter was understood by the parties to the contract. The words are, 'the balance, \$15,205, to be on mortgage at seven per cent.' Had we been told that there was a mortgage already on the property for that amount, we should have understood the words to mean that the buyers were to assume the payment of it. But nothing of that sort being told us, I suppose the meaning must be that the buyers are to give a mortgage for the amount to

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somebody, *primâ facie* to the vendor; and the terms not being defined, the Court was doubtless correct in holding that they were to be in the discretion of the mortgagors" (p. 122). Mr. Justice Rose, at p. 142, recognises the agreement as to the mortgage as valid, and so does Mr. Justice Burton, at p. 112, who remarks, at p. 111: "We must . . . gather the intent and meaning of the parties from the instrument itself, and by our knowledge of the ordinary affairs of life, and, as Tindal, C.J., says in *Stavers v. Curling* (1836), 3 Bing. N.C. 355, by the application of common sense to the particular case in hand."

This case is, to my mind, a direct decision on the validity of the contract, despite the alleged uncertainty, for the Courts below and in appeal both agree that it may well be the foundation of an action to recover money payable thereunder.

The decisions do not rest here, for in a case not noticed in *Reynolds v. Foster—Lightbound v. Warnock* (1882), 4 O.R. 187—Armour, J., treated *McDonald v. Murray* as a decision that the contract in that case was not void for uncertainty because of no time being mentioned for the payment of the mortgage-money. And he proceeds: "The mortgage in the case in judgment was to be given as security for the debt, and whether it should bear interest or not, there being no agreement on the subject, or when it should be payable, there being no agreement as to this, were details which the law would supply, and the agreement being silent as to them would not render it incapable of being enforced" (p. 196). Mr. Justice Cameron agreed.

In view of these authorities, I am not prepared to accept the authority of the cases in 23 O.W.R. as decisive in this case, even though they were directly applicable.

I may note that the two cases in 2 O.R. and 4 O.R. are cited and followed, as to the principle of decision under the Statute of Frauds, in *Christie v. Burnett* (1886), 10 O.R. 609, 619. I also note that *McDonald v. Murray* was finally tried out, with success to the plaintiff and in validation of the contract: *McDonald v. Murray* (1884), 5 O.R. 559.

There appears to be a growing inclination in the Courts to carry out contracts which are complete so far as essentials are concerned, and yet leave something (e.g., as to manner of payment) to be adjusted between the parties. For instance, in

1884, Pearson, J., held a contract sufficient under the statute which provided that the "balance" was "to be paid and the deeds passed over at such time as shall be mutually arranged." He held that in its terms the contract was a final one, and this term was only a subsidiary stipulation: *Ozd v. Coombes* (1884), 28 Sol.J. 378. That observation solves some of the difficulties raised in the reasons for judgment in *Reynolds v. Foster*. And on the same line is a recent decision of Astbury, J., in *Morrell v. Studd & Millington*, [1913] 2 Ch. 648.

However, in the present case, on the evidence, I take it that no business, or commercial man, banker, or land-dealer, could mistake the meaning of "negotiable paper." "Negotiate," when applied to a bill of exchange or an ordinary promissory note, would be generally understood to mean to sell or discount it: Sir R. Couch in *Jonmenjoy Coondoo v. Watson* (1884), L.R. 11 Ind. App. 94, 108; and "negotiable paper" would appear to include or mean "a contractual document . . . such that by virtue of its delivery (or endorsement), all the rights of the transferor are transferred and can be enforced by the transferee against the original contracting party, but it may yet fall short of being a completely negotiable instrument, because the transferee acquires by mere delivery no better title than his transferor:" Bowen, L.J., in *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270, at p. 294. This definition was discussed by the House of Lords on appeal and its general correctness recognised, though Lord Macnaghten rather suggested that it contained a refined distinction either not understood or ignored by the Stock Exchange: *London Joint Stock Bank v. Simmons*, [1892] A.C. 201, at p. 225.

Now it was never intended or contemplated that the sole personal note of the plaintiff was such negotiable paper as would be accepted. It would not be made negotiable unless by the act of the defendant procuring its discount on the strength of his own signature. No evidence is given as to what substance the plaintiff is possessed of; the defendant lived in the United States, and needed something more tangible and satisfactory than the personal engagement of the purchaser. The deal could not be carried through without cash or its equivalent, and this the plaintiff knew as well as the defendant. His refusal to do more than give a personal note was, in my opinion, a refusal to complete the contract. The kind of securities that would be regarded as

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negotiable was discussed and acted on in the case of two documents—but the plaintiff apparently could furnish no more of like value, and had no cash.

The “paper” contemplated was something held by the plaintiff on which another was liable or which was secured substantially as by mortgage on land. It was not something made by this plaintiff, extemporised for the occasion, and leaving the defendant to find the money to answer it. Even if the evidence did not point to the nature of the negotiable paper, I should say the contract was not incomplete; it can easily be made certain by the evidence of financial men; and, in my opinion, the plaintiff can in no way evade the performance of his contract.

I take the fair meaning of the terms to be that, in so far as the plaintiff was unable to supply proper and substantial negotiable paper, such, for example, as had been discussed and approved of during the currency of the contract—he was to pay cash.

The material question is not one as to specifying exact periods of time for the maturity of the negotiable paper; but the requirement of the contract, as interpreted by the surrounding evidence, is, that substantial paper should be furnished by the plaintiff which could be converted into cash forthwith or without unreasonable delay. If the parties cannot agree as to the kind of paper, the Master can mediate their differences—taking such further and other evidence as he may be advised to clear up the real meaning of the words used by both.

The plaintiff’s action has to be dismissed with costs, including all reserved costs and costs of interlocutory proceedings up to this judgment. The defendant is entitled to a judgment for specific performance, with a reference to the Master at Guelph to report as to title and to inquire as to the condition of the chattels and commodities in question, and to report what is due to or payable by either party under the contract, and having regard to any changes or deteriorations that have taken place pending litigation, and is also to ascertain what, if any, damages are payable to the defendant on the plaintiff’s undertakings.

Costs of the reference and further directions are reserved till the Master has reported.

[APPELLATE DIVISION.]

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RE PARKIN ELEVATOR CO. LIMITED.

March 20.

April 4.

May 26.

DUNSMOOR'S CLAIM.

Company—Winding-up—Creditor's Claim—Special Privilege over Ordinary Creditors—"Clerk or Other Person"—"Arrears of Salary or Wages"—Winding-up Act, R.S.C. 1906, ch. 144, sec. 70—Sales-Agent—Contract—Commissions.

A person with whom an incorporated trading company had entered into an agreement under which he was to act as their agent for the sale of their goods in a certain territory, and who had done work for them under the agreement, was *held*, in respect of commissions which he claimed under the agreement, not to be a "clerk or other person" entitled, in the winding-up of the company under the Winding-up Act, R.S.C. 1906, ch. 144, to "be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages," within the meaning of sec. 70 of the Act.

Review of the authorities.

Order of FALCONBRIDGE, C.J.K.B., reversed.

Per MEREDITH, C.J.C.P.:—It is contrary to any reasonable meaning that can be attributed to the words "salary or wages" which a clerk or other person has earned from the company, to include that proportion of the price of the goods which the claimant was to have for the sales made by him.

Per MASTEN, J.:—The words "salary or wages" import a contract for service as distinguished from a contract for services. The claimant was an independent contractor and not an employee entitled to the benefit of the statute. Rules or principles deducible from the authorities formulated.

APPEAL by Dugald A. Dunsmoor, a creditor of the company, from an order made by the Local Master at Berlin, upon a reference for the winding-up of the company under the Winding-up Act, R.S.C. 1906, ch. 144, in so far as it disallowed the claim of the appellant to be collocated in the dividend-sheet by special privilege over other creditors, except those included with him, for the sum of \$1,629, being the balance due the appellant for commission upon sales of the company's goods effected by him under an agreement with the company.

The Master stated the reasons for his order as follows:—

Under an agreement made between the Parkin Elevator Company Limited and D. A. Dunsmoor, the said Dunsmoor became the sole agent for the Parkin company for one year from the 15th March, 1909, for the sale of elevators and sundries connected with them for the Province of Alberta.

Pursuant to this agreement, Dunsmoor sent in a number of orders for elevators, upon which he claims that there is a balance of commission due him of \$1,629.

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In addition to this agreement, there was an arrangement whereby Dunsmoor was to be paid at the rate of 40 cents an hour for work done in the installation of elevators; also the wages of workmen employed to assist him in the installation. The affidavits filed shew the amount of the wages due to Dunsmoor personally on all contracts to be \$284.60; and the wages paid by him to the workmen in connection with the installation of elevators amount to \$141.95. Dunsmoor bought certain material to be used in the installation of the elevators, in all amounting to the sum of \$265.12. (This sum, according to the evidence of John Parkin, is reasonable.)

After consideration of the evidence and arguments, I find that Dunsmoor is entitled to a preference for the amount of wages earned by him and the amount of wages paid by him to the workmen; totalling \$426.55. As to the other items of his claim, namely material supplied, \$265.12, and the balance of commission on contract \$1,629, totalling \$1,894.12, I find that Dunsmoor is entitled to rank on the estate only as an ordinary creditor.

The relation of master and servant did not exist between the company and Dunsmoor under the agreement of the 15th March, 1909.

There was evidence before the Master to shew that the appellant did not give the whole of his time and services to the company, but worked for other employers.

The appeal was confined to the question whether the appellant was entitled to a preference in respect of the \$1,629 claimed for commission.

March 13. The appeal was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court at Toronto.

P. Kerwin, for the appellant.

M. A. Secord, K.C., for the liquidator, the respondent.

March 20. FALCONBRIDGE, C.J.K.B.:—*Re Morlock and Cline Limited* (1911), 23 O.L.R. 165, is accepted as the authority in this class of case. I do not find in it, nor in any of the English and Canadian cases cited, nor in the statute (R.S.C. 1906, ch.

144; sec. 70), the implication that the "clerk or other person in the employment" of the company must be entirely and solely in the company's employment to be entitled to be collocated in the dividend sheet by special privilege over other creditors.

I think, therefore, that the appeal must be allowed.

Re G. H. Morison and Co. Limited (1912), 106 L.T.R. 731, and *Re Western Coal Co. Limited* (1913), 12 D.L.R. 401, support this view.

The cases from the United States Courts to which I have been referred are on the construction of special words in special statutes.

The appellant will have his costs here and below.

The liquidator moved for leave to appeal from the order of FALCONBRIDGE, C.J.K.B.

March 31. The motion was heard by MIDDLETON, J., in Chambers.

H. S. White, for the liquidator.

P. Kerwin, for the claimant.

April 4. MIDDLETON, J.:—Motion under the Winding-up Act for leave to appeal from the order of the Chief Justice of the King's Bench allowing an appeal from the decision of a Local Master in the course of the liquidation and declaring that the claimant has a right to rank preferentially for \$1,629, as a wage-earner.

I have looked into this matter with sufficient care to satisfy me that the case is one in which further litigation is justified. It has not, to my mind, yet been clearly established by any authoritative decision that the claim of an agent such as Duns-moor falls within the preference given to wage-earners.

I therefore think that leave to appeal should be granted. The costs of this application will be in the appeal.

The liquidator entered an appeal accordingly.

May 9. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

M. A Secord, K.C., for the appellant, argued that the special privilege given by sec. 70 of the Winding-up Act applied only to

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cases in which the applicant gave his exclusive services in the sale of like goods to the company, and did not apply to such a case as the present, in which he was employed as agent for other concerns in the sale of such goods. He referred to *Re Morlock and Cline Limited*, 23 O.L.R. 165; *Re Ritchie-Hearn Co.* (1905), 6 O.W.R. 474; *Re Ontario Forge and Bolt Co.* (1896), 27 O.R. 230. As to the interpretation of "salary or wages," he referred to Halsbury's Laws of England, vol. 20, p. 66, para. 132 *et seq.*; *Re Western Coal Co. Limited*, 12 D.L.R. 401; *Re Hartwick Fur Co. Limited* (1914), 6 O.W.N. 363. Reference was also made to *Re American Tire Co.* (1903), 2 O.W.R. 29.

P. Kerwin, for the respondent Dunsmoor, referred to *In re Winter German Opera Limited* (1907), 23 Times L.R. 662; *In re Earle's Shipbuilding and Engineering Co.*, [1901] W.N. 78; *Mitchell's Canadian Commercial Corporations*, pp. 1543, 1544.

May 26. MEREDITH, C.J.C.P.:—The respondent was employed by the Parkin Elevator Company Limited as their sole agent for the sale of their goods in the Province of Alberta, and was to be paid, by the company, a commission of ten per cent. on all sales closed by him. The agreement between them is in writing, and provides, among other things, that the commission shall be paid as follows: "Acceptance by us of draft for 5 per cent. and the balance of the commission to be at 30 days;" that "in the event of any of the goods sold by" the respondent "being sold to customers who either refuse to or cannot pay their accounts, or going into liquidation, or for any cause the account is not paid to" the company, the respondent should lose his commission on the sale; that "in the event of any cuts in price, to enable" the respondent "to close orders," the respondent should "allow half" his "commission to go against the cut price in the event of its being so much lower that it warrants half the amount of the commission;" and that the contract was accepted and agreed to by the company "on the condition that our business will be properly looked after and that all prospective work will be followed up." Further than that, and a provision that the respondent should "not handle any products of any kind that will in any way enter into competition with our products herein specified," there was nothing imposed upon the respondent as to the time or manner in which he should act as such agent.

The company being in liquidation under the provisions of the Winding-up Act, R.S.C. 1906, ch. 144, the respondent brought in a claim for a balance of \$1,629 alleged by him to be owing to him by the company in respect of commissions earned by him under that agreement, and sought, under the provisions of sec. 70 of the Winding-up Act, "to be collocated," in respect of it, "in the dividend sheet by special privilege over other creditors," for the amount of it.

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The Local Master allowed the claim, but refused to give the respondent any priority over other creditors in respect of it, holding that the respondent had not brought himself within the provisions of sec. 70 in respect of this claim, though he had in respect of another claim not coming under the terms of the written agreement between the parties, nor having any bearing upon the question involved in this appeal.

Upon an appeal to a Judge of the High Court Division against the disallowance, by the local officer, of the claim for the special privilege, it was held that sec. 70 of the Act does apply to the case, and it was ordered that the claim, as allowed by the local officer, be collocated in the dividend sheet by special privilege over other creditors under that section: and this appeal is brought by the liquidator of the company, by leave as provided for in the Act, against that order, with the object of having the ruling of the local officer restored.

These three facts must be established before any one claiming it can have this privilege given to him: the claim must be one of a clerk or other person in, or having been in, the employment of the company, in or about its business or trade; for "arrears of salary or wages due and unpaid" at the time of the making of the winding-up order; and must not exceed "the arrears which have accrued . . . during the three months next previous to the date of such order."

One may agree with the learned Judge, whose order is appealed against, and yet be far from able to support that order. One might go further and expressly declare that a person in the position of the respondent, under the terms of the agreement I have mentioned, might very well be a clerk or other person in the employment of the company in or about its trade or business; and yet be far from declaring that as such he is entitled to the special privilege over other creditors provided for in sec. 70: for it is only

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in respect of arrears of "salary or wages" due to such a person that the privilege extends. The learned Judge in his reasons for overruling the local officer does not mention this view of the case.

It is well in such cases as this to have regard to the nature and the purpose of the privilege, which is against the wide general purpose of the enactment in question as well as other enactments and bankruptcy and insolvency laws generally, their general purpose being equality among creditors. Salaries and wages are generally needed for, and generally expended in, the support and maintenance of the persons earning them, their wives and families and others dependent upon them, and so may well be given priority, for a short period, over debts due to other creditors in the ordinary course of trade or business and generally more nearly related to the profit and loss account of the creditor than his sustenance or that of those dependent upon him: see *Gordon v. Jennings* (1882), 9 Q.B.D. 45.

It has been said in some of the Courts in some of the United States of America, that such a preference is one in derogation of common law, and so statutes conferring it must be strictly construed. But the Courts of this Dominion and of this Province are under the statutory mandate to deem every enactment remedial and to give to it such liberal construction as will best ensure the attainment of its object according to its true "meaning and spirit." So treating the enactment in question, the person seeking its benefit must bring his case fairly within its provision: the onus is upon him.

Looking at the question broadly, one is aided by other enactments, provincial as well as federal, providing for like and other protection of the earners of wages or salaries; for instances: the Wages Liability Act, R.S.C. 1906, ch. 98; the Companies Act, R.S.C. 1906, ch. 79, sec. 166; the Wages Act, R.S.O. 1914, ch. 143; the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 231; and the Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 174.

So too the cases interpreting enactments such as that in question, especially interpretations of the Imperial bankruptcy enactment, from which, perhaps through the Insolvent Act which was at one time in force in Canada, the enactment in question seems to be a lineal descendant. We ought to give effect to that which has been pretty generally considered the meaning of such enact-

ments in respect to such a preference as sec. 70 of the Act in question confers.

In the year 1901, in the case of *In re Earle's Shipbuilding and Engineering Co.*, [1901] W.N. 78, it was held by Joyce, J., that a commission on the tonnage of ships turned out from a ship-building yard, allowed to workmen in addition to "a fixed salary," came within the meaning of the words "wages or salary" in the provisions of the Imperial bankruptcy laws relating to preferential payments in bankruptcy.

In the year 1904, in the case of *The Elmville* (No. 2), [1904] P. 422, it was held that a bonus to a master of a vessel in certain events, in addition to his wages, was covered by the word "wages" contained in the Merchant Shipping Act, 1894.

In the year 1906, in the case of *Re Klein*, [1906] W.N. 148, it was held by Bigham, J., that a commission allowed to a "commercial traveller" on "all business done by him for the debtor," in addition to a fixed weekly sum, was part of his "salary," under the same provisions of the same bankruptcy law as those under which the *Earle* case was decided.

A like ruling was made, in the year 1911, in the High Court of Justice of this Province, in the case of *Re Morlock and Cline Limited*, under the provisions of the enactment in question in this appeal; the only difference between the facts of that case and the case of *Re Klein* was, that the amount allowed in the *Morlock* case was of the man's travelling expenses, and in the other case the commission, in addition to the fixed wages; it being said in the *Morlock* case that, in its circumstances, "his expenses are as much a part of his wages as the fixed sum:" *Re Morlock and Cline Limited*, 23 O.L.R. 165, 169.

And a step in advance of all these cases was taken in the High Court Division here, by a single Judge, in the year 1914, in the case of *Re Hartwick Fur Co. Limited*, 6 O.W.N. 363; it being there held that a "commercial traveller," who was paid only by way of a commission upon the amount of the sales made by him, in that capacity, for the company, was as to such remuneration within the benefit conferred upon persons in the employment of the company in respect of salary or wages due to them by the company, under the enactment in question.

If we should go on thus, step by step in advance, without ever

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looking back at the enactment, we might very easily get in time even far beyond such a case as this—for instance, the case of a solicitor and his fees, or a physician or surgeon and his. Looking back at the enactment, I cannot but think that the cases have already gone to the furthest extent the elasticity of the words of the enactment in question will permit, whether they have or have not been overstretched in any case. It seems to me quite contrary to any reasonable meaning that can be attributed to the words “salary or wages” which a clerk or other person has earned from the company, to include that proportion of the price of the goods sold which the respondent was to have for the sales made by him; though, having regard to that which the respondent was bound to do under his agreement, he might well be a person in the employment of the company entitled to the special privilege in question, if there were not the other restricting words in the enactment in question: see *Hamberger v. Marcus* (1893), 157 Penn. St. 133; *Brierre & Sons v. Creditors* (1891), 43 La. Ann. R. 423; *Henderson v. Koenig* (1902), 168 Mo. 356; and *Castle v. Lawlor* (1879), 47 Conn. 340.

It has not been argued before us, nor does it seem to have been before the Chief Justice whose order is now appealed against, or before the Master, that the respondent has no claim because of the provision, contained in his agreement, that he should lose his commission on his sales if “for any cause the account is not paid to us;” or because it is barred by the three months’ limitation contained in the enactment in question. I mention the fact so that there may never be any misunderstanding respecting it.

Because the respondent’s claim, now in question, never was, in my opinion, within the provisions of sec. 70 of the Winding-up Act, I would allow this appeal and restore the ruling of the Local Master.

MASTEN, J.:—The liquidator appeals from the judgment of Falconbridge, C.J.K.B., dated the 20th March, 1916, allowing Dugald A. Dunsmoor to be collocated on the dividend sheet by special privilege over other creditors, pursuant to sec. 70 of the Dominion Winding-up Act, for the sum of \$2,055.55.

The claimant Dunsmoor acted as sole agent for Alberta on

behalf of this company. The agreement between him and the company is as follows:—

“ C O N T R A C T

“Between

“THE PARKIN ELEVATOR CO. LTD., HESPELER, ONT.

and

“D. A. DUNSMOOR, ESQ., CALGARY, ALTA.

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“We agree from March 15th, 1909, to enter into an agreement with you, to be sole agent for our products, viz., elevators and sundries connected with them, to be used either in the repair or installation of elevators of any type or style that we manufacture, also on fans, blowers, heating systems and other products of this line.

“We agree to pay you a commission of ten per cent. on all sales closed by yourself, or on all orders sent in from your territory, whether closed by you or by any other party.

“We agree to pay the commission as follows: acceptance by us of draft for five per cent. and the balance of the commission to be at 30 days.

“We also agree that the territory shall be the Province of Alberta.

“You on your part to agree that we shall collect our own accounts, and, in the event of any cuts in price, to enable you to close orders, that you agree to allow half your commission to go against the cut price in the event of its being so much lower that it warrants half the amount of the commission.

“It is further agreed that you will not handle any products of any kind that will in any way enter into competition with our products herein specified.

“The duration of this agreement is for one year, and, in the event of either party desiring to cancel this agreement, it shall be necessary to give three months' notice.

“In the event of any of the goods sold by you being sold to customers who either refuse to or cannot pay their accounts, or going into liquidation, or for any cause the account is not paid to us, you to lose your commission on sale.

“It is also agreed that this contract is accepted and agreed to by us on the condition that our business will be properly looked after and that all prospective work will be followed up.”

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Section 70 of the Winding-up Act, pursuant to which this claim is made, reads as follows: "70. Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order."

The records of the Court shew that the order for the winding-up of this company was made on the 29th March, 1910, and it appears from the affidavits filed that there accrued to the claimant during the three months next previous to the winding-up order two sums, one of \$90 and the other of \$1,020, so, if the claimant is entitled to a preference for any sum, it is for \$1,110 and no more.

But it is contended by the liquidator that the claimant does not come at all within the purview of sec. 70.

It seems to me that the crucial point for determination is, whether the claimant was (1) a person so in the employment of the company as to become entitled to salary or wages (2) or was an independent contractor for the performance of specific services. The conclusion in this and similar cases must turn upon the particular facts of each individual case; and this circumstance has led to diversity in the decisions, different minds naturally taking different views of the same facts. Under these circumstances, other cases, and particularly cases decided upon different statutes, do not lay down any binding rule of general application.

Nevertheless, it seems to me that some principles helpful to the determination of the question here in controversy can be deduced from a consideration of the cases.

To come within the benefit of sec. 70, the contract must be a contract for service, not a contract for services. It is not to every employment that the Act applies. It is confined to employments of which it can be predicated that the person employed receives salary or wages.

Whatever else they may connote, I think that the words "salary or wages" import a contract for service as distinguished from a contract for services.

A book-keeper employed by the year makes a contract for

service. A surgeon employed to perform an operation makes a contract for services. The one is paid a salary, the other a fee.

The former is employed to obey his master's orders and submit throughout to his supervision and direction. The latter is employed to exercise his skill and achieve an indicated result in such a manner as is most likely in his judgment to ensure success.

Three cases in our own Courts afford illustrations of the application of this principle. The first is *Re Ontario Forge and Bolt Co.*, 27 O.R. 230. It is a decision by the late Mr. Justice Robertson respecting the claim of an auditor to be collocated as a preferential creditor. The claim was disallowed. After referring to the duties and position of an auditor for the purpose of indicating that he does not perform his work subject to the immediate control and direction of the directors, the learned Judge proceeds as follows (p. 234): "Now there is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them: *per* Bayley, J., in *Hardy v. Ryle* (1829), 9 B. & C. 603, at p. 611." And, at p. 233, the learned Judge said: "In my judgment, he does not belong to such class of persons any more than a solicitor would who had been asked to investigate and advise on any contract, or transaction, in which the company had been interested." The claim to a preference was disallowed.

In the next case, *Re American Tire Co.* (1903), 2 O.W.R. 29, the claimant was a mechanical expert and inspector to the department of the company having charge of the sale of the "New Departure Coaster Brake." A Divisional Court composed of Falconbridge, C.J.K.B., and Britton, J., held that, in the circumstances of that case, the claimant was not entitled to any preference under the statute, referring to and following *Re Ontario Forge and Bolt Co.*, above mentioned. The reasons for decision are not given at length in the only report available, and I have not been able to secure the original reasons of the Judges.

The next case in order is *Miquelon v. Vilandre Co.* (1913), a Quebec case, reported in 16 D.L.R. 316. In it Globensky, J.,

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held that an accountant temporarily engaged by the day to make an audit of a company's books, and who is not subject to any direction or control in so doing, has no preferential claim under sec. 70 for his remuneration, on the winding-up of the company. In his view, the section is to be restrictively interpreted. He says that the object of the law seems to have been to protect persons whose sole or at least whose chief employment is with one employer and whose principal means of support are derived therefrom—thus emphasising the ideas of service and of personal control by the paymaster.

A second principle is that an employee entitled to wages or salary is *primâ facie* (unless there is other express provision in the contract) subject to the command of the employer as to the manner in which he shall do his work, while an independent contractor chooses the mode in which the work is done and the persons who do it; also, provided control is retained by the employer, the fact that the employee is hired and paid by the piece or by the job, or using his own implements, makes no difference. I refer as illustrations to *Sadler v. Henlock* (1855), 4 E. & B. 570; *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543, at p. 552; and *Re Western Coal Co. Limited*, 12 D.L.R. 401.

This last case is a decision by Beck, J., in the Supreme Court of Alberta. A. was employed to haul coal with his own team and waggon to individual customers of the company. No specific amount of coal was specified, and he could stop work or be discharged at any time. In other words, he hauled by the load. He was subject to direct orders of the company as to place and time and quantity of delivery. In giving judgment, Beck, J., says: "The extent of the right of control seems to be the important question in distinguishing between the position of a servant and that of an independent contractor, rather than the question whether, in addition to the personal services of the servant, he employs property of his own to aid him in his services." The creditor was held entitled to a preference.

I am unable to see that the present case is touched by the decisions in *Re Morlock and Cline Limited*, 23 O.L.R. 165, and *Re Hartwick Fur Co. Limited*, 6 O.W.N. 363.

It is true that each of these cases related to the claim of a person employed by the insolvent company to sell its goods; the

essential matter is not, however, the work to be performed, but the nature and terms of the contract of employment.

It has been held in *In re Newspaper Proprietary Syndicate Limited*, [1900] 2 Ch. 349, in *Re Ritchie-Hearn Co. Limited*, 6 O.W.R. 474, followed in *Re S. E. Walker Co. Limited* (1913), 12 D.L.R. 769, that a managing-director was not entitled to the benefit of the section, because a managing-director belongs to the master, not to the servant, class. If it were relevant to the decision of this case, I should, while agreeing with the decisions under the English Act, express my doubts of the corresponding decisions under the Canadian Act, because the latter Act seems to me to extend its benefits to any employee of the company, superior or inferior, who is entitled to wages or salary.

In the *Morlock and Cline* case the sole inquiry was as to whether, assuming the *Ritchie-Hearn* case to be law, a commercial traveller or "bagman" was or was not "a thing of higher character than a clerk." One may perhaps suspect, from the elaborately solemn reasoning on this delicate question of "finer clay," that it is more than half judicial sarcasm; but, be that as it may, the case lays down, I think, nothing that assists us in the present inquiry; and the *Hartwick* case is wholly concerned with the question whether the receipt of remuneration by way of commission excludes the claimant from the benefit of sec. 70. I think that the receipt of commission in lieu of salary or wages looks in the direction of an independent contract rather than an employment entitling the claimant to the benefit of the section, but in any case it is only a minor circumstance and may well be overborne by others looking in the opposite direction.

Applying these principles to the facts of the present case, I note that the claimant is made sole agent for products of the company throughout all Alberta; that there is no stipulation in regard to the manner in which the claimant shall perform his contract and his duties thereunder, except that the "business will be properly looked after and that all prospective work will be followed up."

The company retains no power of direct control over or interference with the claimant. The claimant's time is his own; and it is plain that contemporaneously he may be engaged in other business; for the contract provides that he "shall not handle

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any products of any kind that will in any way enter into competition with our products herein specified."

There is nothing to prevent him from incorporating a company, employing sub-agents, or conducting the business by means of any suitable organisation established by him, and he is to receive commission not only on goods sold through himself, but "on all orders sent in from your territory, whether closed by you or by any other party."

Having regard to these considerations, I think the claimant is an independent contractor and not an employee entitled to the benefit of the statute.

The order now in appeal should be set aside, and that of the Master restored.

RIDDELL and LENNOX, JJ., agreed in the result.

Appeal allowed.

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[APPELLATE DIVISION.]

May 29.

WILLOUGHBY V. CANADIAN ORDER OF FORESTERS.

Life Insurance—Registered Friendly Society—Endowment Certificate—Proof of Age of Insured—Admission in Certificate—Absence of Allegation of Mistake or Fraud—Provisions of Insurance Contract and Constitution of Society—Statutory Admission—Insurance Act, R.S.O. 1914, ch. 183, sec. 166, sub-secs. 7, 9, 10, 11—Amending Act, 6 Geo. V. ch. 36.

The judgment of BRITTON, J., 36 O.L.R. 507, was affirmed (GARROW, J.A., dissenting).

It was *held*, by the majority of the members of the Court, that the defendants (a registered friendly society) had admitted the age of the deceased in the endowment certificate issued to him and now sued upon by his beneficiary, and that (having regard to the provisions of the contract and of the defendants' constitution), no further proof of age was necessary to entitle her to recover, mistake or fraud not being alleged or proved.

The effect of sub-secs. 7, 9, 10, and 11 of sec. 166 of the Insurance Act, R.S.O. 1914, ch. 183, and of the repeal of sub-sec. 11 by 6 Geo. V. ch. 36, and of the clauses substituted for it, was discussed.

Held, by MAGEE, J.A., that the defendants had failed to comply with sub-sec. 7, and, under sub-sec. 10, must be taken to have admitted the correctness of the statement of the deceased as to his age; and the effect of the amendment was merely to make sub-sec. 11 apply only to sub-secs. 1 to 6 instead of to sub-secs. 1 to 10.

APPEAL by the defendants from the judgment of BRITTON, J., 36 O.L.R. 507.

May 3. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. A. Hollinrake, K.C., for the appellants, argued that, under the provisions of the Insurance Act, the defendants were not under obligation to pay the claim until the age of the deceased had been admitted or duly proved, which had not been done in this case. He referred to the Insurance Act of 1912, 2 Geo. V. ch. 33, sec. 166, and the amendment thereof by the Act of 1913, 3 & 4 Geo. V. ch. 35, sec. 8, sub-secs. 1 and 2, by the latter of which the section did not come into force till the 1st July, 1913.

J. A. Hutcheson, K.C., for the plaintiff, respondent, referred to sec. 89 of the Act of 1912, and to *Re Rogers and McFarland* (1909), 19 O.L.R. 622, 631.

Hollinrake, in reply, argued that sec. 89 of the Act was not applicable.

May 29. MAGEE, J.A.:—By his application of the 7th March, 1888, to the defendants for a certificate of membership, the plaintiff's husband promised to conform to and obey the laws, rules, and regulations of the Order, then in force or thereafter enacted, or submit to the penalties therein contained. The certificate, issued to him eight months later, on the 21st November, under the defendants' seal and the signatures of the High Chief Ranger and High Secretary, states that it is subject to the constitution and to such by-laws "as are now in force and to such amendments or additions as may hereafter be adopted by the Order or Court of which the insured is a member." The certificate further certified "that Brother William R. Willoughby, who was regularly admitted a member of Court Thousand Islands, No. 66, located at Gananoque, on the 19th day of March, A.D. 1888, at the age of 33 years, has this day been duly registered as a member of the Canadian Order of Foresters, and as such is entitled to all the rights and privileges of membership in the Order; and, further, the person or persons whose name or names are hereinafter written are, within thirty days after satisfactory proof of the death of the said brother, entitled to the sum of \$1,000 from the endowment fund of the Order: Provided always, that the brother above mentioned shall, at the time of his death, be a member in good standing, and shall have in all things complied with the constitu-

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tion, rules, and regulations of the Order and the subordinate Court of which he may be a member, and the questions in his medical examination papers have truthfully and correctly been answered. . . . This certificate is designated as payable to my wife."

In his application he stated that he was born in the county of Leeds, in Ontario, on the 22nd April, 1854, and that he was 33 years old last birthday. In his medical examination statement, endorsed thereon, he certified that his age last birthday was 33, and that he had two brothers living "ages 30-40" and two sisters living "ages 36-38." In the application he had directed the "endowment" to be payable to his daughter.

There is no explanation of the delay from March to November in the issue of the certificate, nor of the change from the daughter to the wife. At the foot of the certificate are printed the words, "I accept this certificate upon the terms and conditions herein specified," and this is signed and sealed by Willoughby, and dated the 1st February, 1892. On the face of the certificate it is an admission that on the 19th March, 1888, he was of the age of 33 years. The Thousand Islands Court being at Gananoque, in the county of Leeds, where he was born, it may well be that local information had been submitted or obtained, or his own precise statement as a member of a local family may have been accepted as satisfactory, before this admission was made. Evidently something not before this Court had taken place to cause the delay and the change in the beneficiary, and, it may be, to cause the issue of a certificate with this admission. No form of certificate of membership is prescribed by the constitution or by-laws or rules. It does not appear that this is not a special form of certificate used for cases where satisfactory proof of age has been offered. It would be a singular form to use where proofs of age were yet required. Although it mentions proofs of death, it contains not a word about proof of age being necessary.

The constitution as amended in 1915, a month before his death, a copy of which has been put in, is said to be the same in effect as that in force previously as to age. By sec. 53, the monthly assessments payable were to be determined by the age at the date of admission to the Order, and the rates for those between the ages of 30 and 35 for \$1,000 were 70 cents per month, while for

those between the ages of 35 and 40 they were 85 cents per month. Under sec. 59, every applicant for beneficiary membership must furnish satisfactory proof of age, or satisfactory proof of age must be furnished, before any claim for insurance will be recognised or paid. This does not say "every member," but "every applicant." Therefore, it would seem that the production in some cases of proof before admission to membership or the issue of a certificate was contemplated, and such may have taken place here. It cannot be intended that, if the society has already admitted the age, it must be proved over again. When the member is not here to speak for himself, and his version of the facts cannot be obtained, it would not be reasonable or just to say that, holding a certificate making such an admission, he could be expected to pay any attention to notices, addressed to members in general, warning them to submit proofs and have their ages admitted. He may well have rested upon the admission which he had, and considered that such notices did not affect him.

The defendants have not attempted to prove that the statement of age was wrong. They had before them the answers already referred to as to the ages of the two brothers and the two sisters. The plaintiff's son gave evidence that one of these brothers, younger than the plaintiff's husband, is living, apparently not far from Gananoque, and he—the son—thought there was "a year difference between them." The defendants, instead of asking whether this was the older or the younger of the two brothers, or trying to satisfy themselves or the Court that there was something wrong, have chosen to rest upon the strict necessity of proof of age after the member's death.

Section 87 of the constitution provides that, where a mistake is made in the statement of the age without any intention to deceive, the beneficiaries shall not be entitled to more than a proportional amount in the ratio of the premium paid and the proper premium for the true age. Section 166 of the Ontario Insurance Act, 1912 (now R.S.O. 1914, ch. 183, sec. 166, and dating back to the 14th April, 1892, 55 Vict. ch. 39, sec. 34), provides that where the age is material and is given erroneously, but in good faith and without intention to deceive, the contract is not avoided, but only a somewhat similar proportion shall be recoverable. There is here no suggestion of intention to deceive;

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and so, even if the deceased were shewn to have been born as early as the 8th March, 1853, instead of the 22nd April, 1854, it would not affect the amount payable. In any case the plaintiff would be entitled to seventy eighty-fifths or thereabouts of the \$1,000. Section 173 of the Insurance Act provides that, where the amount payable is in dispute, it shall *primâ facie* be the maximum stated or indicated in the contract.

In view of the admission of age in the certificate, no further proof of age would, on the evidence, be, in my opinion, necessary. The plaintiff was made beneficiary by her husband on the 17th April, 1913, instead of the former beneficiary, his first wife. She should, therefore, recover the full amount with costs, and the appeal should be dismissed with costs.

This admission in the certificate, however, was not referred to on the argument here, nor apparently at the trial; and, if the decision here were to rest solely upon that ground, it would be proper that counsel should be heard as to it more particularly, as it may be that this is the general form used by the defendants.

If this is not the proper construction of the certificate, then the question arises whether the judgment appealed from was not warranted under sec. 166 of the Ontario Insurance Act.

The Ontario Insurance Act of 1912 was passed on the 16th April, 1912. Section 166, as already referred to, provided for the payment of a proportional sum in case of error in statement of age, and the first five sub-sections dealt with that subject. The sixth or last sub-section declared that the whole section should apply, not only to future applications and contracts, but also to any theretofore made. In 1913, by 3 & 4 Geo. V. ch. 35, sec. 8, which came into force on the 1st July, 1913, this section, 166, was amended by adding four new sub-sections 7, 8, 9, and 10. These, being made a part of the section, would come within the wording of sub-sec. 6, which made the whole section applicable to pre-existing contracts.

Sub-section 7 required every registered insurance corporation (which, under sec. 2 of the Act of 1912, would include these defendants) to "send to every person with whom a contract is made, within one month thereafter, a printed notice . . . and annually thereafter until proof of age is admitted, stating that the age of the insured is material to the contract, and evidence that

the age stated in the application is the true age of the insured will be required before the policy is paid. This notice shall also be printed in red ink in type not smaller than 10 point upon all notices to the insured and upon all receipts for premiums." Sub-section 8 declared that sub-sec. 7 should not apply to a contract under the industrial plan. Sub-section 9 declared that sub-sec. 7 should not apply to a registered friendly society (such as these defendants), "provided that the notice mentioned therein is published on the first page of the official newspaper or journal of the society, in each issue thereof, and printed in red ink . . . upon all certificates issued by the society, and upon all receipts or pass-books issued to the members." Sub-section 10 enacted that, upon failure of a corporation (which would include the defendants) to comply with the provisions of sub-sec. 7, the corporation should be deemed to have admitted the age mentioned in the application as the correct age.

On the revision of the statutes (R.S.O. 1914, ch. 183, sec. 166), sub-sec. 1 was divided into two, so that sub-sec. 6 would have been sub-sec. 7, but it was placed after sub-secs. 7, 8, 9, and 10, and became sub-sec. 11 of sec. 166.

The first question arising upon this enactment is the meaning of sub-sec. 9. Did it take registered friendly societies wholly out of the operation of sub-sec. 7 (as was done with industrial plan contracts by sub-sec. 8), and make a new enactment for them alone, or did it only relieve them from sub-sec. 7 on condition that they did something else? Considering the differences in general practical working between friendly societies and ordinary life insurance companies, one would be quite prepared to find the former, that is, a requirement adapted to their mode of working. Then, too, the general statement that sub-sec. 7 shall not apply to these societies would lead one to expect, not merely that it would not apply in any particular case, but that it would not apply at all, and that some other general requirement follows. Undoubtedly, also, the words "provided that" are often used without the intention of creating a condition, and merely as introducing a new subject, and, if they had here begun a new sentence, there would be strong reason so to interpret them. In that case, however, one would expect that the words would be such as, "Provided that by such societies the notice mentioned

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therein shall be published" etc., "and printed" etc., instead of "is published . . . and printed." But, in view of the use of the latter tense and the continuation of the clause in the same sentence, with the exempting words preceding, the proper construction, I think, is, that the exemption is not a general one, but one for each case, just as sub-sec. 7 itself applies only to each case, and that in each particular case the condition is attached to the exemption, and this more especially from the fact that sub-sec. 10 makes no provision for the consequences of non-compliance with sub-sec. 9, which would be as proper and necessary as with regard to sub-sec. 7. That being so, the society is relieved from sub-sec. 7 only by complying with sub-sec. 9. If it does comply, that is sufficient; but, if it does not, then it is not relieved from sub-sec. 7; and, if it has failed to observe its provisions, sub-sec. 10 operates to say that it has admitted the age. I am, therefore, of opinion that it was necessary for the defendants to comply with either sub-sec. 7 or sub-sec. 9, to avoid the admission.

The defendants have, ever since the 1st July, 1913, properly published the notice in their official paper. They did not print it on the certificate issued in 1888; but I would not construe the sub-section as requiring that to be done upon certificates theretofore issued, which would have to be recalled from all parts of the country, and probably of the Empire, and from other countries. A pass-book or marked receipt-book had been given to Willoughby, in which his monthly payments were credited as made by or for him, and initialled by the financial secretary of the local Court at Gananoque. This was used in place of issuing separate receipts, and this practice was, no doubt, in view of the Legislature. This book begins in January, 1907, and contains entries of monthly payments up till his death, with the officer's initials, and the officer speaking of the book says: "That passed between him and me each payment." The book has on it a printed notice: "Members when paying assessments should not fail to bring their receipt-books." It appears from the evidence of the High Secretary of the defendants that these books are not sent from their head office to the members, but the books are supplied to the local Courts in quantities, apparently like stationery, as they order them, and they "issue them to the insured," and it is optional with the local Courts to order pass-books or receipts. In these circumstances, it cannot, I think, be said

that the books are "issued" at the head office. They are issued by the defendants through their local officer at Gananoque. If issued by the head office to each member, the head office would never again have an opportunity of printing anything on them, and could not be said ever to re-issue them, as the books never come to that office. But, inasmuch as the issue of receipts or pass-books is left to the local officer, and every monthly receipt would have to bear the printed notice, there would be no difficulty in affixing or stamping on each pass-book the requisite notice, or issuing a new book at any time when the pass-book is brought in for the purpose, or to have another payment entered.

Looking at the object of the section, I think the proper construction is, that neither the Order nor the local Court was bound to call in outstanding pass-books to put the printing on them; but that, when brought in and delivered out again with a fresh receipt therein, they should be considered as again "issued," and the local officer who was entrusted with the original issue should have been required to have the notice put on them, and it is no greater hardship upon the defendants to have to entrust this to him than to entrust to him the issue of the proper form of receipts each month. The Legislature evidently intended constant reminders to the members. I am, therefore, of opinion that, in not printing the notice in this pass-book when reissued to the deceased, after the 1st July, 1913, the defendants failed to comply with sub-sec. 9.

Then did the defendants comply with sub-sec. 7? That sub-section requires the insuring body to send a notice to "every person with whom a contract is made, within one month thereafter, . . . and annually thereafter." "Thereafter" must mean after the making of the contract. As regards pre-existing contracts, the notice could not be sent within a month, nor, if made two or more years previously, could it be sent annually. This left room for the argument that the annual notice was only necessary in the case of contracts made after the 1st July, 1913. But, inasmuch as the provision was inserted in a section which was expressly made applicable to pre-existing contracts, the reasonable interpretation, in my opinion, is, that the annual notice was requisite after the 1st July, 1913, in the case of past as well as future contracts. It is admitted that none was sent. However, the sub-section also requires the notice to be put on all receipts

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for premiums. A receipt is not the less a receipt because it is in a book. If it is in a book, the society, under sub-sec. 9, need only have it printed once thereon, not on each receipt entered therein—but on receipt or book it must be. There were twenty-five receipts entered in this book after the 1st July, 1913, and no notice was put therein. The defendants did, therefore, in my opinion, fail to comply with sub-sec. 7 in both respects, and, under sub-sec. 10, must be taken to have admitted the age, 33, to be correct, and the judgment founded on that statutory admission was right.

But, since the judgment, the Legislature have, on the 27th April, 1916, passed the Ontario Insurance Amendment Act, 1916, sec. 4 of which repeals sub-sec. 11 of sec. 166, and substitutes a new sub-sec. 11, whereby only sub-secs. 1 to 6 (those enacted in 1912) are made applicable to both past and future contracts, and declares that "this section shall be deemed to have been in force on and from the 16th day of April, 1912, but nothing in this section shall affect the disposition of any costs in any action now pending or heretofore determined, but such costs shall be awarded and shall be payable as if this section had not been passed." This would seem to imply that the Legislature intended to interfere even with actions "determined" before the Act was passed, except as to costs. If it had the drastic effect in this case of depriving the plaintiff of her judgment, after her contest with the society, it would be matter for regret. Fortunately, as I think, it has no such result, whatever may have been the intentions of those who procured its passage.

As I read it, the effect of the change is merely to make sub-sec. 11 apply only to sub-secs. 1 to 6, instead of sub-secs. 1 to 10. Thereby it releases sub-secs. 7, 8, 9, and 10 from the retrospective effect which sub-sec. 11 expressly gave originally to sub-secs. 1 to 5 in the Act of 1912, and it leaves sub-secs. 7 to 10 as free as if in a separate section, or as if in the Act of 1913 they had not been added to sec. 166. What then is the effect?

There is no more reason why members admitted or persons insured after the 1st July, 1913, should thereafter have constant reminders to prove their age, than why earlier members or insured persons should be so reminded. The previous sub-sections allowing the proportional sum in case of error apply expressly to all. All

equally needed the protection of both sorts. When, therefore, sub-sec. 7 requires that every corporation shall send the warning printed upon "all notices to the insured and upon all receipts for premiums," I see no ground for believing that it was intended to apply, or should be construed as applying, only to future policies or contracts. The words "the insured" are used frequently in the Act, and have not necessarily to be connected with the word "person" in the earlier part of the sub-section, limited, if it is, by the word "thereafter" to persons insured in the future. So likewise in sub-sec. 9, even if the printing upon certificates issued were, as I think it would be, limited to those issued after the 1st July, 1913, I do not see any reason for considering that the holders of such certificates are alone "the members" to whom any receipts or pass-books given must have the printed notice.

It is, I think, a reasonable view to take of the amendment of 1916, that the Legislature wished only to relieve the societies from having any doubt that they were not bound to call in old certificates and pass-books from all parts, for the purpose of inserting the printed notice therein.

I am, therefore, of opinion that, upon both grounds, the plaintiff's action was not premature, and the judgment should stand for the full amount insured, with interest, and the appeal be dismissed with costs.

MACLAREN, J.A.:—I agree in the result of the judgment of my brother Magee.

HODGINS, J.A.:—The appellants on the 21st November, 1888, issued to W. R. Willoughby, who subsequently married the respondent as his second wife, a beneficiary certificate, the first clause of which is in these words: "This certifies that Brother William R. Willoughby, who was regularly admitted a member of Court Thousand Islands, No. 66, located at Gananoque, on the 19th day of March, A.D. 1888, at the age of 33 years, has this day been duly registered as a member of the Canadian Order of Foresters, and as such is entitled to all the rights and privileges of membership in the Order; and, further, the person or persons whose name or names are hereinafter written are, within thirty days after satisfactory proof of the death of the said bro-

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ther, entitled to the sum of \$1,000 from the endowment fund of the Order."

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The second clause is as follows (omitting references as to change of occupation): "Provided always, that the brother above mentioned shall, at the time of his death, be a member in good standing, and shall have in all things complied with the constitution, rules, and regulations of the Order and the subordinate Court of which he may be a member, and the questions in his medical examination papers have truthfully and correctly been answered. . . . And this certificate is subject to the constitution and to such by-laws as are now in force, and to such amendments or additions as may hereafter be adopted by the Order or Court of which the insured is a member."

This certificate was founded upon an application which reads thus:—

"Application for Certificate.

"To the R.W. High Court, C.O.F.

"Having made application for membership in Court Thousand Islands, No. 66, located at Gananoque, Ont., I desire that a certificate of membership be issued to me. My name in full is William Ritcherdson Willoughby. I was born in the county of Leeds, Province of Ontario, on the 22nd day of April, 1854, and am now 33 years old last birthday; am married. My P.O. address is Gananoque, Ont. If accepted, I hereby direct that endowment to me be payable to Alice Maud Willoughby.

"(Name in full and relationship)

"Daughter."

"Contract.

"I hereby agree that this application, with the above conditions, shall be a part of the contract, and also promise to conform to and obey the laws, rules, and regulations of the Order governing this Court now in force, or that may hereafter be enacted, or submit to the penalties therein contained.

"In witness whereof, I have hereunto affixed my hand this seventh day of March, 1888.

"W. R. Willoughby, applicant.

"G. L. Johnston, witness.

"E. Cook, witness."

Among the questions to be answered was the following:
 "Age last birthday . . . 33."

A certificate in the following form appears at the bottom of the series of questions:—

"I hereby certify the above answers to be correct and true to the best of my knowledge, and it is hereby agreed, understood, and binding between myself and the Incorporated Canadian Order of Foresters that anything kept back or concealed from the examining physician, or any question not correctly answered in this medical examination paper, shall invalidate and render null and void any claim whatsoever that I myself, or my heirs, executors, or assigns, should otherwise have upon the Order.

"In witness whereof, I hereunto affix my name this 5th day of February, 1888.

"Wm. R. Willoughby, applicant.

"T. H. Dumble, M.D., witness."

Endorsed on the application is this recommendation:—

"After a careful review of the application and the report of the medical examiner, I hereby recommend that a certificate be granted as soon as due notice is given the R.W. High Secretary of his initiation."

"Signed this 13 day of Mar., 1888.

"M. N. Stanley,

"Chairman of Medical Board."

In the margin of the above is a stamped seal of the Order, reading:—

"Canadian Order of Foresters, Brantford, Ont.

"Thos. White, High Sec., Apr. 19, 1888."

Among the duties of the High Secretary are these: "He shall prepare and issue all insurance certificates or policies and duly register all such policies, setting forth in detail the leading facts and directions of each certificate."

The certificate sued on is signed by Thos. White, High Secretary, and by the High Chief Ranger.

In the constitution, filed as exhibit 6, clauses 57 and 59 are as follows:—

"57. Upon satisfactory proof of the death of a beneficiary member in good standing, the wife, children, or other designated

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payee or payees of the deceased shall receive the amount of insurance as named in his insurance certificate or certificates, such amount to be paid out of the insurance fund of the High Court."

"59. Every applicant for beneficiary membership must furnish satisfactory proof of age, or satisfactory proof of age must be furnished, before any claim for insurance will be recognised or paid. Every applicant for beneficiary membership who, at the date of such application, is forty years of age or over, must furnish satisfactory proof of age within one year from the date of his admission to the Order. If such a member shall fail to do so, he shall, at the expiration of the said year, stand suspended and shall forfeit all claims on the Order, either for insurance or for dues and assessments paid, provided that a member, so suspended, may, on furnishing satisfactory proof of age within six months after the date of such suspension, be reinstated in the manner provided for by sub-section 2 of section 73."

. On the 17th April, 1913, the insured changed the beneficiary, naming the present respondent, and this alteration was noted and recorded by the appellants on the 26th August, 1913. The insured died on the 25th day of July, 1915. The writ was issued on the 19th November, 1915, and the trial took place on the 29th March, 1916, at Brockville.

The trial Judge, Mr. Justice Britton, finds as follows:—

"In Willoughby's application he stated that his age was 33, on his then last birthday—and that is the age stated in the endowment certificate now sued upon. There is no reason to think that the age was not truly stated.

"The defence at the trial, and the only defence, was that, by the terms of the application, and by the terms of the endowment certificate, the defendants are not obliged to pay unless and until the age of the plaintiff's husband is admitted or proved.

"There is no suspicion of fraud in this case—no wilful misrepresentation—nothing to shew that the age was not truly stated—nothing against the standing of the insured in the Order. The plaintiff is 57 years of age—but she is not in a position to prove the age of her husband.

"The defence seems to me a purely technical one, and one that ought not to prevail in this case unless it is one which, under the contract and statute, would clearly bar the plaintiff's recovery."

The argument at the trial and before us turned upon the provisions of sub-secs. 7, 9, 10, and 11 of sec. 166, Ontario Insurance Act. The latter sub-section was, after the trial, repealed at the last session of the Legislature (6 Geo. V. ch. 36), and the repeal is stated to take effect from the 16th day of April, 1912. The repealing section is as follows:—

“4.—(1) Sub-section 11 of section 166 of the Ontario Insurance Act is repealed and the following substituted therefor:—

“(11) Sub-sections 1 to 6 of this section shall apply not only to any future application for, or contract of, insurance, but also to any application heretofore taken and to any contract heretofore made.

“(2) This section shall be deemed to have been in force on and from the 16th day of April, 1912, but nothing in this section shall affect the disposition of any costs in any action now pending or heretofore determined, but such costs shall be awarded and shall be payable as if this section had not been passed.”

This legislation seems rather reactionary, as the policy of the Legislature in enacting sub-secs. 7, 9, and 10 was evidently to put the onus on insurance companies, and require them to admit the age after the death of the insured, if they had not brought notice home to him in his lifetime that he must actually prove it.

The amendment has this further, and, I should think, unintended, effect. Sub-section 11 appears first as so numbered in the Revision of 1914, but is identical in words with sub-sec. 6 of the statute of 1912. When numbered 11, it applied to all the ten preceding sub-sections. Not having been sub-sec. 11 until 1914, its repeal as of the 16th April, 1912, when it was sec. 6 in the Insurance Act of 1912, must mean that sub-secs. 1 to 6 had from 1912 till 1916 no retrospective effect, as the section which had made sub-secs. 1 to 16 apply to all insurance contracts since 1900, was not then in force.

However this may be, the repeal must, I think, from the peculiar wording in which it is couched, be taken to indicate that it was the intention of the Legislature to allow sub-secs. 7, 9, and 10 to operate without any express direction such as applied to sub-secs. 1 to 6.

If it were necessary to construe these sub-sections, I would not be oppressed with the difficulty and expense of complying

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with them suggested by counsel for the appellants. It would not cost a great deal nor take much time to supply and use a rubber stamp when money was paid. And, if the certificates were refused when asked for, the beneficiary would find it hard to rely on non-compliance with that provision. The pass-book is produced every month, and stamping it is sufficient, if the receipt is given by an entry in it.

The repeal of sub-sec. 11, however, takes all the plausibility out of such an argument, and leaves this insurance company in the position of using as a defence a bogey which does not exist.

But I am relieved from considering this question by the view I take of the situation of the parties.

The appellants in the certificate sued on state that the deceased, who had been "regularly admitted a member of Court Thousand Islands . . . on the 19th day of March, 1888, at the age of 33, has this day been duly registered as a member of the Canadian Order of Foresters."

The constitution of the Order provides an alternative as to proving age, i.e., either the applicant must furnish satisfactory proof of age, or it must be furnished before a claim is paid.

The birthday and the place of birth were mentioned in the application; the insured certified them to be correctly stated, and the Chairman of the Medical Board and the High Secretary thereafter respectively recommended and issued the beneficiary certificate in the form in which it now appears.

I think the age has been agreed to, as the contract recites and certifies it, and it is not a large assumption that proof satisfactory to the Order was given by the applicant before a certificate in that form could issue. If not, it would have been easy to insert in the certificate "subject to proof of age." If the application is part of the contract as against the insured, it must also be part of it as against the insurer, unless he proves that it is incorrect.

Besides this, under clause 57 of the constitution, the only proof required before the beneficiary becomes entitled to the money is that the member was in good standing. This, under sec. 89 of the Insurance Act, enables the beneficiary to recover without further proof.

Apart from this, the case stands in this position. The learned trial Judge has found good faith and that there is no reason to think that the age was not truly stated. No mistake has been

established. If sec. 166 (1) is not applicable, having been originally passed after the insurance was effected, then clause 87 of the defendants' constitution has in terms enacted practically the same thing, and it is part of the insurance contract. It is as follows:—

"87. Where the age of a beneficiary member, as given at the date of admission, is incorrectly stated, and it subsequently appears that he was on that date over the maximum age, for the time being, for admission to the Order, his contract of insurance shall from its inception be null and void. Where, however, a beneficiary member was not at date of admission to the Order over the maximum age for the time being for admission, and yet a mistake was made in the statement of his age, without any intention to deceive, then the beneficiary or beneficiaries of such person under such contract shall not be entitled, after his death, to receive more than an amount which bears the same ratio to the sum that such beneficiary or beneficiaries would otherwise be entitled to recover as the premium proper to the stated age of such person bears to the premium proper to the actual age of such person, the said stated age and the actual age being both taken as at the date of the contract; but, should such mistake be discovered during the lifetime of such person, he shall have the privilege of paying up all arrearages with interest at 6 per cent., and his insurance shall then rank for full amount of same.

"Where the age of a beneficiary member as given at the date of admission is overstated, and he has paid an amount greater than required at the date of admission, he shall have refunded to him all over-payments, together with interest at 6 per cent. per annum."

The contract, and clause 59 of the constitution, only require proof of death and that the insured was then in good standing. Can it be open to a corporation, under these circumstances, without proving either mistake or fraud in regard to age, to refuse payment of the claim, or is it not bound, under clause 87, to shew that there was an initial error? I think the latter is the correct view of the appellants' duty, if they wish to escape payment or to reduce the amount payable. To hold otherwise would be to put upon the beneficiary a heavier burden than the contract warrants and to give the appellants the same relief as if they had alleged and proved mistake or fraud.

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It is to be observed that the defence pleaded in this case is only effective for delay (see sec. 165, sub-sec. 4), as it does not charge error, mistake, or fraud.

I would affirm the judgment and dismiss the appeal with costs.

GARROW, J.A.:—Appeal by the defendants from the judgment of Britton, J., at the trial, in favour of the plaintiff.

By an endowment certificate dated the 21st November, 1888, issued by the defendants, the defendants agreed, subject to certain conditions, to pay to the wife of William R. Willoughby, upon his decease, the sum of \$1,000. His then wife died, and he married the plaintiff, and on the 17th April, 1913, revoked the former direction, in favour of the plaintiff. William R. Willoughby died on the 25th July, 1915, and the plaintiff thereupon demanded payment.

The certificate contains a provision that it is subject to the constitution and by-laws of the Order, one of which prescribes that "every applicant for beneficiary membership must furnish satisfactory proof of age, or satisfactory proof of age must be furnished, before any claim for insurance will be recognised or paid."

Under this provision, the defendants, before complying with the plaintiff's demand, required proof of the age of her late husband, which she refused to supply, contending that the defendants, by an alleged failure to comply with the provisions of sec. 166 of the Ontario Insurance Act, had admitted that the age mentioned in the application was the correct age.

In the year 1888, the defendants had issued to the deceased a pass-book, produced at the trial, in which, on production to the defendants' local Court, the payments required to be made to keep on foot the insurance were from time to time entered, down to the last payment made before his death. And the objection to which effect has been given is that, after the passing of the statute 3 & 4 Geo. V. ch. 35, the defendants did not print in red ink upon such pass-book, and upon the so-called receipts in it, the notice as to proof of age required by that statute.

That statute, it may be observed, was an amendment to the general Insurance Act, passed in the preceding year, 2 Geo. V.

ch. 33, by, so far as the present litigation is concerned, adding new sub-secs. 7, 8, 9, and 10, to sec. 166 of the former statute. Both are contained in ch. 183, R.S.O. 1914, in which what was sub-sec. 6 of sec. 166 in the former statute, became sub-sec. 11. Sub-section 7 (in ch. 183) provides that, "subject to the provisions of the previous sub-sections of this section, every corporation registered under this Act shall send to every person with whom a contract is *made, within one month thereafter*, a printed notice . . . in such form as the Superintendent shall approve, and annually thereafter until proof of age is admitted, stating that the age of the insured is material to the contract, and that evidence that the age stated in the application is the true age of the insured will be required before the policy is paid; and such notice shall also be printed in red ink in type not smaller than 10 point upon all notices to the insured and upon all receipts for premiums."

Sub-section 9 is as follows: "Sub-section 7 shall not apply to a registered friendly society, provided that the notice mentioned therein is published on the first page of the official newspaper or journal of the society, in each issue thereof" (which was done) "and printed in red ink in type not smaller than 10 point upon all certificates issued by the society, and upon all receipts or pass-books issued to the members." Sub-section 10 provides that, "upon failure of a corporation to comply with the provisions of sub-section 7, the corporation shall be deemed to have admitted the age mentioned in the application as the correct age."

Sub-section 11, formerly sub-sec. 6, provides that "this section shall apply not only to any future application for, or contract of insurance, but also to any application heretofore taken and to any contract heretofore made."

How sub-sec. 11 became transposed is not apparent. But that it was done in error, as the learned counsel for the defendants contends, is, I think, apparent from the fact that in the recent session of the Legislature (1916) a further amendment was made, practically restoring it to its former position, and declaring that the sub-section as so amended shall be deemed to have been in force on and from the 16th day of April, 1912, except as to the costs of any pending action.

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The amendment made in 1916 was not before Britton, J., when he delivered judgment, indeed had not then apparently been even finally passed. The reference to the costs of pending proceedings, and the fact that the statute is in form, at least in part, declaratory, justifies, I think, the contention of counsel for the defendants that the Legislature intended it to apply to pending actions such as this. See *Attorney-General v. Marquis of Hertford* (1849), 3 Ex. 670; *Attorney-General v. Theobald* (1890), 24 Q.B.D. 557. And the more so that the amendment, if it affects the case at all—which may, I think, be considered as at least doubtful—does not take away the plaintiff's cause of action, but merely affects or can affect the mode in which the claim must be proved.

I do not, however, personally regard the question of the application or non-application of the amendment to the case before us as absolutely vital. More, I think, depends upon the proper construction and application of sub-secs. 7, 9, and 10, which would, I think, be practically the same whether they preceded or followed the former sub-sec. 11.

It is perfectly clear, I think, from its language, that sub-sec. 7 was intended to be applicable only to contracts entered into after it became the law. The direction is to send the first notice within one month after entering into the contract—an impossibility in the case of contracts like the present, made years before. That is also the notice which is to continue to be sent annually thereafter, and which is to be printed in red ink. And, if that is the proper construction of sub-sec. 7, there is nothing in sub-sec. 9 upon which to contend successfully for a different conclusion as to the class of contracts there intended.

The sub-section begins: "Sub-section 7 shall not apply . . . provided," which is the equivalent of "if;" in other words, the registered friendly society is given the choice of complying with sub-sec. 7 or of giving the notice in the official newspaper or journal, if any, of the society, and printing it in red ink upon all certificates issued by the society and upon all receipts or pass-books issued to its members.

If a society has no official newspaper or journal, it would obviously have no choice, but would be obliged to conform to sub-sec. 7.

Then the language of the sub-section itself leads to the same conclusion. The direction is, in addition to publishing in the

newspaper or journal, if any, to print the notice prescribed in sub-sec. 7, in red ink, upon all certificates, and upon all receipts or pass-books issued to the members; which could only reasonably, in my opinion, mean certificates, receipts, or pass-books not already issued.

The evidence shews that the only pass-book ever issued to the deceased is the one produced, before referred to, issued in the year 1888; and the only evidence of receipts issued to him after sub-sec. 7 became the law, is the entries made in the pass-book.

As I have indicated, my opinion is, that, by the language of the sub-sections in question (7 and 9), the reference is only to insurances effected after the date of the amendment made by their introduction in 1913. But, even if this view is erroneous, I should still be of the opinion that the defendants are in this instance unaffected, because they were under no duty, in any view of the statute, to call in and re-issue, with notices printed in red ink, certificates and pass-books already issued. I also think that the entries in the pass-book are not "receipts" within the meaning of that word as used in sub-sec. 9. The defendants are under no obligation to use pass-books at all. They may use "receipts" only—the case provided for in sub-sec. 7.

The language of sub-sec. 9 is not "receipts *and* pass-books," but "receipts *or* pass-books," whichever is used. "Pass-book" means something more than the cover and the printed and ruled paper. To say that each trifling entry therein is a "receipt" within the meaning of the sub-section, and so requiring a notice to be printed on it in red ink in type of not less than 10 point, etc., sounds very much to me like talking nonsense.

I see no alternative but to *allow* the appeal. This will not prevent the plaintiff from supplying the best proof she can of her late husband's age, and bringing another action if the defendants still refuse to pay, which is, I think, very improbable.

It may be that the defendants will be, as I hope they will, generous enough to renew the offer made at the trial to pay the claim without costs—an offer which, I think unwisely, the plaintiff refused.

The appeal should be allowed, but, under the circumstances, without costs.

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Appeal dismissed; GARROW, J.A., dissenting.

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[APPELLATE DIVISION.]

April 20.

May 29.

RE SOLICITOR.

*Solicitor—Investment of Money of Client—Undertaking to Assume Investment
and Repay Money—Failure to Implement—Negligence—Misconduct—
Penalty—Application to Strike off Roll.*

Negligence on the part of a solicitor may not amount to misconduct; and, while a solicitor's undertaking will be enforced by the Court, the extreme penalty of striking the solicitor off the roll will not be inflicted unless misconduct is shewn. Failure to implement an undertaking is not necessarily misconduct.

The solicitor whose conduct was in question made an improper and unsafe investment of his client's money, entrusted to him for investment, in the bonds of a brick company, which soon afterwards went into liquidation. Apparently having faith in the success of the company, in which his own money was invested, the solicitor undertook, after a certain date, if his client desired it, to take the bonds off her hands and repay her the sum invested; and, upon his failure to implement his undertaking, it was *held*, that he had incurred only the minor penalty of being summarily ordered to perform his undertaking.

Review of the authorities.

United Mining and Finance Corporation Limited v. Becher, [1910] 2 K.B. 296, [1911] 1 K.B. 840, specially referred to.

Order of CLUTE, J., varied.

MOTION on behalf of Alice Emmeline Morris for an order for the payment by the solicitor to her of \$2,144 and interest, pursuant to his undertaking and agreement with her, his client, and in default that his name be struck from the roll of solicitors of the Supreme Court of Ontario.

April 10. The motion was heard by CLUTE, J., in the Weekly Court at Toronto.

Harcourt Ferguson, for the applicant.

M. Wilkins, for the solicitor.

April 20. CLUTE, J.:—Alice Emmeline Morris describes herself as an English working girl, who came to Canada to better her condition in life; she says that she has no relatives in Canada, and is now at service; that she had at the time she came to Canada one share of the capital stock of the London and Brighton Railway Company and one share of the London and Chatham Railway Company, that yielded her a dividend of about \$75 a year. She employed the solicitor as her solicitor, and in the course of his employment as such solicitor she informed him that she owned the said shares and desired to get the proceeds of her

shares invested in Canada, and asked him for his advice as to what was necessary for that purpose, "and he told me he would sell these shares and invest the money in bonds or debentures of a brick company for me, that paid \$90 half-yearly, and he told me if I would do this he would pay me the money back so invested in these bonds or debentures, at any time I wanted it after the 1st of September, 1914." She gave the railway shares to her solicitor, and in November or the 1st December, 1913, he informed her that he had sold them out "to a woman and a man, and invested the money in the said brick bonds." A month or two afterwards, being advised that she should have a letter from her solicitor setting out their agreement, she went to him and he gave her the following letter:—

"Toronto, Feby. 4th, 1914.

"Miss E. Morris, 77 Nassau St., City.

"Dear Miss Morris: As you are aware, I closed the exchange of your railway stock in the London and Brighton Railway, also in the London and Chatham Railway, for fifteen debenture bonds in the Excelsior Brick Company Limited, whose works are located at Beamsville, Ont.

"These debenture bonds are in denomination of \$200 per bond, and are numbers 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, and 344, making in all fifteen bonds. I am having these bonds registered in your name, and, as soon as same have been registered, will forward same to you, unless you advise me differently. I have been holding these bonds at my bank for safe keeping in the meantime.

"As I mentioned to you at the time of the exchange, I am willing to take these bonds off your hands for the amount that your stock taken in exchange would realise, at any time after September 1st.

"I now find that the amount realised on this stock amounted to \$2,144, and, as above mentioned, I am willing to let you have this amount for the fifteen bonds above mentioned, any time after September 1st, of this year. As you are aware, another dividend will mature on July 1st, on these bonds, amounting to \$90. These mature, as you are aware, on the 1st of January and the 1st of July of each year, and bear interest at 6 per cent. and are payable at the Bank of Ottawa, in the King Edward Hotel.

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"I have written the Salvation Army Insurance Department in England, regarding your insurance policy, and have also advised them regarding the December premium that should be paid by Adj. Braine. Upon hearing from this society, will immediately advise you."

The receipt of the letter was the first time she became aware that he had exchanged the shares for the brick bonds.

After the 1st September, she asked her solicitor for the money realised from the said shares, namely, \$2,144. I find that he put her off with excuses from time to time; and, although she has applied to him repeatedly for the money, he has neglected to pay over the same, and has put her off from time to time, until finally he said he could not pay her because of some trouble or difficulty that he himself was in with some man, whom he named, who was in the brick business with him, and it was then for the first time that she learned that he was interested in some way in the brick company that he had put her money in. Further correspondence has taken place between Miss Morris and her solicitor, in which he presents various excuses for not paying over the money, and in which he made some offers of security from one Mr. Frain, who, he says, received the stock and transferred the bonds. The letters and securities offered are unsatisfactory and insufficient.

The solicitor has been examined, and his examination, to say the least, is unsatisfactory. In view of this, I suggested that I desired the parties to appear before me, and I delayed the giving of judgment for that purpose, but the solicitor has not availed himself of the opportunity to make further explanation. I find that he was acting as the solicitor of Miss Morris before and at the time her shares were disposed of and she received the stock in question. He admits that her shares sold for \$2,144. I think there can be no doubt that the bonds were absolutely worthless, and it is difficult to believe that the solicitor did not know it. He was one of the directors of the Excelsior Brick Company, the company that issued the bonds.

It seems that Mr. Frain is a musician residing at Bay City, Michigan.

In answer to the question, "What was your position in the Excelsior Brick Company—were you president?" the solicitor said: "I was simply a stool-pigeon; I was a director, and did not have an office at all."

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"Q. Did you hold any stock in the company? A. Yes.

"Q. How much? A. Well, really I think I had \$10,000 worth.

"Q. And the company was wound up under an order of the Supreme Court of Ontario on the 24th April, 1914? A. I believe there was a liquidator appointed.

"Q. And really these bonds are to-day worthless? A. I am sorry to say they are. . . .

"Q. What was your interest in the company—did you have bonds or stock? A. Both.

"Q. How many bonds did you have? A. I think about \$20,000 worth.

"Q. Of bonds; and you had \$10,000 worth of stock? A. Yes.

"Q. Was that the amount that you had at the time this transaction took place between you and Miss Morris? A. Yes, and still have them.

"Q. How did you come to deal with Mr. Frain in the transaction—had you known him long? A. I have known him for about 25 years.

"Q. Did Mr. Frain owe you any money at any time? A. He owes me some money now.

"Q. How much? A. I cannot tell you that.

"Q. Approximately? A. Approximately about \$5,000 (*sic*).

"Q. How much did he owe you at the time this transaction took place? A. About \$500.

"Q. The same \$500? A. Yes.

"Q. Since Miss Morris has had them" (the bonds) "there has been no dividend declared? A. No, no more than I paid out of my own personal pocket."

He claims that Miss Morris owes him \$155 paid out to her and a bill of costs at \$50, in all \$205.

In *United Mining and Finance Corporation Limited v. Becher*, [1910] 2 K.B. 296, [1911] 1 K.B. 840, it was held that "the Court has jurisdiction, on the application of a person to whom a solicitor gives an undertaking in his capacity as a solicitor, to exercise its summary procedure to compel the solicitor to carry out the undertaking, even though the applicant was not the client of the solicitor and the undertaking was not given during the course of legal proceedings, and there is no suggestion of dishonourable or discreditable conduct on the part of the solicitor. *Peart v. Bushell*

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(1827), 2 Sim. 38, and a dictum of A. T. Lawrence, J., in *In re Solicitor, Ex p. Hales*, [1907] 2 K.B. 539, not followed."

The present case is a very much stronger case than the above. I think the applicant is entitled to an order directing the solicitor to pay over the amount claimed, and that in default his name be stricken from the roll of the Court as a solicitor; payment or satisfactory settlement of this claim to be made within one month. The order to strike the solicitor from the roll is not to become effective until default has been made in the payment of the claim and the matter has been again mentioned.

The solicitor should pay the costs of the application.

The solicitor appealed from the order of CLUTE, J.

May 15. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

M. Wilkins, for the appellant, referred to *Re McCaughey and Walsh* (1883), 3 O.R. 425, 427; *Re Campbell* (1872), 32 U.C.R. 444, 446; *Re Fletcher* (1881), 28 Gr. 413.

Harcourt Ferguson, for the client, respondent, argued that the order of the learned trial Judge was justified by the evidence.

Wilkins, in reply, referred to *Hands v. Law Society of Upper Canada* (1888-90), 16 O.R. 625, 17 O.R. 300, 17 A.R. 41.

May 29. GARROW, J.A.:—Appeal by the solicitor from the order of Clute, J., dated the 20th April, 1916, directing the solicitor to pay to Alice Emmeline Morris, the applicant, the sum of \$2,144, and interest thereon at five per cent. from the 1st December, 1913, and that in default of such payment the solicitor be struck from the roll as a solicitor.

The main facts are not in dispute. The applicant describes herself as an English working girl, now at service. She owned, when she came to Canada, two shares of railway stock in England, which she desired to have sold and the proceeds invested in Canada. She consulted the solicitor about it, and he recommended as an investment the bonds or debentures of the Excelsior Brick Company.

So far as the evidence shews, he did not himself sell the English shares. Instead, he procured transfers of them to be made by

the applicant to a friend of his called Frain, residing at Bay City, in the State of Michigan, in exchange, it is said for 15 bonds of that company held by Frain, of the par value of \$200 each, which were transferred by Frain to the applicant. Frain subsequently, as he reported to the solicitor, for some reason not explained, sold the English shares and realised the sum of \$2,144.

On the 4th February, 1914, the solicitor wrote to the applicant a letter, in which he says: "As you are aware, I closed the exchange of your railway stock . . . for fifteen debenture bonds in the Excelsior Brick Company Limited, whose works are located at Beamsville, Ont. . . . As I mentioned to you at the time of the exchange, I am willing to take these bonds off your hands for the amount that your stock taken in exchange would realise, at any time after September 1st. I now find that the amount realised on this stock amounted to \$2,144, and, as above mentioned, I am willing to let you have this amount for the fifteen bonds above mentioned any time after September 1st, of this year. . . ."

The applicant, after the 1st September of that year, repeatedly demanded from the solicitor performance of his undertaking, with no result. The terms of the solicitor's undertaking are too explicit to admit of doubt, and that he is in default in performance is also equally beyond question. Nor is there, I think, any doubt as to the power and jurisdiction of the Court to enforce performance of such an undertaking on the part of a solicitor on a summary application such as this.

Several of the cases on the subject are referred to and discussed by Hamilton, J., in *United Mining and Finance Corporation Limited v. Becher*, [1910] 2 K.B. 296, referred to by Clute, J.

The real difficulty in the matter is as to the consequences to follow disobedience of the order to pay. Do they, on the authorities, warrant the extreme measure, upon default, of removing the solicitor from the roll? Not without doubt and hesitation, I have arrived at the conclusion that they do not.

Failure to implement an undertaking has never, I think, in itself, been held to be such misconduct as the Court will act upon in striking from the roll. In the technical sense, it is not necessarily misconduct at all. An illustration of this occurs in the case to which I have referred, where the solicitor holding the money

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was not even charged with dishonourable or discreditable conduct, and really appeared to have been anxious to get rid of the money if he could have done so safely. See also *In re Pass* (1887), 35 W.R. 410. The Court enforces an ordinary uncomplicated undertaking "with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers:" *per* Coleridge, J., in *In re Hilliard* (1845), 2 D. & L. 919.

A solicitor is only struck off the roll for misconduct. What is called misconduct has been defined in a number of cases referred to in Cordery's Law of Solicitors, 3rd ed., pp. 176 *et seq.*, but to which it is unnecessary to refer in detail. The result of them is that, speaking generally, to constitute misconduct the misconduct must be either criminal or fraudulent. Mere delay in paying over a client's money is not sufficient. Misappropriation of it is. Conduct amounting to negligence, even gross, is not misconduct. It must be shewn that the conduct is dishonourable to the solicitor as a man and dishonourable in his profession. See *per* Lord Esher, M.R., in the case of a solicitor, *In re Cooke* (1889), 24 L. J. Notes of Cases 237.

In *In re A Solicitor* (1895), 11 Times L.R. 169, Wills, J., in the Divisional Court, said: "There must be something amounting to misrepresentation or deceit, and not merely the fact that the money has not been paid over."

Clute, J., in his very full and careful review of the evidence, says that the solicitor's examination was, to say the least, unsatisfactory, and comments upon his failure to appear before him personally to supplement it by further explanations, for which purpose he had let the matter stand over. The learned Judge also expresses the opinion that "there can be no doubt that the bonds were absolutely worthless, and it is difficult to believe that the solicitor did not know it. He was one of the directors of the Excelsior Brick Company, the company that issued the bonds."

It is to be observed, however, that there is no finding that the exchange with Frain was not a real transaction, and that it was Frain and not the solicitor who sold the English shares and received the proceeds. Both have so sworn, and there is no evidence to the contrary.

The applicant admits that she knew before parting with the English shares that it was proposed to invest the proceeds in the bonds of the brick company. She did not, she says, know that the solicitor was a director in the company or indeed that he had any personal interest in it. If she had known, it is not easy to say what effect the knowledge would have had. She was in the hands of the solicitor, ignorant of such matters herself, and perhaps the more likely to have thought well of the investment because the solicitor had invested his own money in it.

That the investment was an improper and unsafe one is now perfectly clear. The company was organised only about the end of the year 1912, and on the 24th April, 1914, it was placed in liquidation. The solicitor said that he personally held bonds of the company to the extent of \$20,000 and stock to the extent of \$10,000, which he acquired early in the year 1913, and which he still held when the order to wind up was made. He had thus given some evidence of his own faith in the enterprise, further supported, I think, by his volunteering the undertaking to take the bonds off the applicant's hands at the price the English stock had sold for.

If, when he wrote the letter of the 4th February, 1914, he had been aware of the worthlessness of the bonds, he would scarcely have been so willing then to assume definitely that responsibility.

Upon the whole, while there is certainly reason to be suspicious, there is also justification, I think, for regarding the solicitor as dupe rather than knave. When the negotiations began, however absurd it may seem now, he may quite honestly have considered that he was proposing to the applicant a reasonably safe and sound investment, which would considerably increase her income; and he therefore, in my opinion—erring, if I err, on the side of mercy—has incurred only the minor penalty of being summarily ordered to perform his undertaking, which in the end may even be more beneficial to the applicant than if the order to pay was to be followed by an order taking away his means of earning money with which to pay.

The order should be amended accordingly, and there should, under the circumstances, be no costs of the appeal.

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MACLAREN and MAGEE, JJ.A., concurred.

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HODGINS, J.A.:—I agree with the judgment of my brother Garrow. I think that, before an order to strike off the roll can be made, misconduct and not mere negligence must be established. The relationship between solicitor and client is a fiduciary one; and, if a definite finding of improper conduct had been made by the learned Judge appealed from, I would have been in favour of affirming the present order. But, as I read his judgment, it falls short of this, perhaps because the evidence, so far as it went, just failed to prove it conclusively.

The circumstances were suspicious, but no great attempt seems to have been made to develop the real situation.

In agreeing to the variation proposed, I think express provision should be made for the handing over of the bonds and coupons upon payment, so that the solicitor will be held to the position taken by him on his examination, that the arrangement under which he advanced \$155 to Miss Morris was that he would be able to reimburse or repay himself when the Excelsior people paid their second coupon. It ought not to be recoverable or set off except against the interest on the \$2,144, nor until payment of the full amount of the balance thereof.

Order below varied.

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May 29.

[LATCHFORD, J.]

FINDLAY v. PAE.

Will—Codicils—Revocation—Revival—Wills Act, R.S.O. 1914, ch. 120, secs. 2 (e), 23, 25.

The testator, who died in 1916, had duly executed six testamentary writings, which were all in existence and un mutilated at the time of his death. The first was a will made in May, 1909; the second, a codicil made in December, 1909; the third, a codicil made in September, 1910; the fourth, a will made in 1913, which revoked the first, second, and third; the fifth and sixth, codicils made in 1915, purporting to be codicils to the will of 1909, ignoring the will of 1913, which the testator, an aged man, though of undoubted testamentary capacity, had perhaps forgotten:—

Held, that the will of 1909 and its codicils of 1909 and 1910, having been revoked by the will of 1913, were revived by the codicils of 1915, which in express terms confirmed the earlier will, one referring to it by date, and the other (the last) speaking of it as "my said will and the three codicils I have made thereto," while making no mention of the will of 1913; and accordingly probate of the will of 1909 and its four codicils was granted.

Sections 2 (e), 23, and 25 of the Wills Act, R.S.O. 1914, ch. 120, considered. *In the Goods of May* (1868), 1 P. & D. 581, *In the Goods of Wilson* (1868), *ib.* 582, and *McLeod v. McNab*, [1891] A.C. 471, 476, referred to.

ACTION by the executors named in a testamentary writing signed by James Hylands, dated the 28th May, 1909, to establish it (as affected by certain codicils) as the last will and testament of the testator, who died on the 18th January, 1916.

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The action was tried by LATCHFORD, J., without a jury, at Barrie.

E. D. Armour, K.C., for the plaintiffs.

Ross Duncan, for the defendants Pae and Lennox.

W. A. J. Bell, K.C., for the defendants Henry and Coulson.

D. C. Ross, for the defendant Allen.

May 29. LATCHFORD, J.:—The plaintiffs are the executors named in the will of James Hylands, late of Thornton, in the county of Simcoe, deceased, dated the 28th May, 1909. Four codicils were made to this will, bearing date respectively the 18th December, 1909, the 2nd September, 1910, the 24th February, 1915, and the 6th December, 1915. The testator died on the 18th January, 1916.

Probate of the will and the four codicils was applied for by the executors in the Surrogate Court of the County of Simcoe. Mrs. Pae and Mr. W. G. W. Lennox, two of the grandchildren of the deceased, filed a caveat against the granting of probate. The matter was moved up into the Supreme Court, and Mrs. Pae and Mr. Lennox, with others interested as legatees and as representing classes, were made defendants in an action brought by the executors to establish the will as affected by the codicils mentioned.

The defendants Henry and Coulson set up another will made by the deceased, dated the 29th April, 1913, and ask that this later will, as affected by the two codicils of 1915, be declared to be the last will and testament of James Hylands. They assert that the will of 1913 is not revoked, and is still in full force and effect, except in so far as it may be varied by the codicils of 1915, and pray that the Surrogate Court of the County of Simcoe be directed to grant letters probate of the will of 1913 and the subsequent codicils.

The defendants Mrs. Pae and Mrs. Allen simply ask that it be declared which will is the true last will of the deceased, and submit their rights to this Court.

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Both the wills and all the codicils were duly signed and witnessed. The testator, though advanced in years, had on all six occasions full capacity to make a will.

The only question arising is, whether the will of 1909, with its codicils of 1909 and 1910—having been revoked by the will of 1913—was revived by the codicils of 1915, which confirm in express terms the earlier will, the third codicil referring to it by date, and the fourth speaking of it as “my said will and the three codicils I have made thereto,” while making no mention of the later will.

Ordinarily, throughout a period of 25 or 30 years, the deceased employed Messrs. Strathy & Esten, of Barrie, as his solicitors, and made them the depositaries of most of his mortgages and other documents. They had been calling in his investments and depositing the moneys arising therefrom to his credit in various banks. Occasionally, and more in connection with loans than otherwise, he had business relations with the legal firm of Lennox & Cowan, of the same place.

The will of 1909 was drawn in the office of Lennox & Cowan, and was duly executed in the presence of Mr. Cowan and Miss Marr, a stenographer in his office. It was left with Mr. Cowan, and placed in an envelope with an earlier will, from which the signature of the testator had been torn. In December, 1909, Hylands called on Lennox & Cowan and gave instructions for a codicil to the will. This was engrossed by Miss Marr on the reverse of the last page of the will, and properly signed and attested. The will was then returned to the custody of Lennox & Cowan.

While the will was still kept in the same office, a second codicil was added to it, in September, 1910, revoking a legacy of \$500 mentioned in the eighth paragraph of the will.

At a date not stated definitely, Mr. Cowan was applied to by Hylands for the will, and handed it to the testator, retaining the former revoked will. On the 29th March, 1911, Hylands brought to Mr. Esten the will he had obtained from Mr. Cowan, and requested Mr. Esten to take care of it. Mr. Esten then placed it in the will-box in his firm's vault.

On the 26th April, 1913, Mr. Cowan, *suâ sponte*, drove out to Thornton, a distance of ten or twelve miles, to interview Mr.

Hylands regarding a loan. The old gentleman was not making loans at the time—a fact which may not have been known to Mr. Cowan. On this occasion, Hylands is said to have asked Mr. Cowan if he could come out some day and draw a will. Mr. Cowan agreed to do as requested, and went out on the 29th April, taking with him a relative, a very old man, as a witness, and the will that had been revoked when the will of 1909 was made. A new will was then drafted. It is manifest that this will, like that of 1909, was based on the revoked will which Mr. Cowan had with him; in fact, the main if not the only difference between the will of 1909 and the will of 1913, so far as it affects legacies, is that one-third of the residuary estate devised in the former to the children of the testator's daughter, Jane Stewart, and changed by the first codicil to a gift to his said daughter and her children in equal shares, is given by the second will to Mrs. Stewart alone.

An important change is that the will of 1913 appoints Mr. Cowan solicitor of the estate.

From two o'clock in the afternoon of the 29th April until six, Mr. Cowan was, he says, working at the will. "I did not," he says, "spend five minutes in any other way." No one else was present during the four hours. Mr. Lewis was asked to absent himself, as were two young ladies who were in the house but not in the same room as the testator and Mr. Cowan.

Mr. Cowan was asked (Q. 55): "When you got instructions to draw the will, as far as you knew there was no will in existence?" He answered: "I did not know that; I knew there was no will in my office."

It is plain that Mr. Cowan was aware that the will of 1909 was elsewhere than in his office. It is not indeed improbable that he knew that it was in the office of Mr. Esten. There is not, however, any evidence to support the suggestion that Hylands was induced to make the will of 1913 for the purpose, which the will effected, of taking from a rival firm the administration of a large estate which in the nature of things was soon to fall in.

Mr. Cowan did not give his testimony before me. As he was on active service, his evidence was taken *de bene esse*. While his evidence, owing to the benefit he received under the will, must be regarded with suspicion (*Paske v. Ollat* (1815), 2 Phillim. 323;

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Donnelly v. Broughton, [1891] A.C. 435, at p. 442), and stricter proof than in ordinary cases required, I cannot but find, unless I reject Mr. Cowan's evidence, that the will of 1913 was signed by the testator when of sound and disposing mind, and was attested as prescribed by the Wills Act, 10 Edw. VII. ch. 57, now R.S.O. 1914, ch. 120. It purported to revoke all prior wills, and therefore had the effect of revoking the will of 1909, and with it the codicils of 1909 and 1910.

The testator afterwards acted as if he had absolutely forgotten that he made the will drawn by Mr. Cowan or any will subsequent to that of 1909.

In November or December, 1914, Hylands requested Mr. Esten to send him a list of the legacies contained in the will deposited with him, and to add them up. Mr. Esten accordingly made out a list from the will of 1909, as affected by the codicils, and sent it summed up to the testator.

Shortly afterwards, in February, 1915, William King, a nephew of Hylands, called on Mr. Esten and asked him to bring the will out to Thornton, which was done. On arriving at Hylands', the testator asked Mr. Esten if he had the will, and, receiving an affirmative answer, expressed a desire that it should be read over to him. King, who was in the room, started to leave, but his uncle requested him to remain. Hylands had by him at the time the list of legacies prepared from the will by Mr. Esten. The will was then read over "to near the end," and the two codicils were read. Mr. Esten remembers distinctly that he read the date of the will. Hylands then said that Mrs. Stewart had been very good to him, and that he wished to give her and her daughter Minnie (now Mrs. Allen) \$10,000 more in the way of specific legacies than was given to them by the will.

The third codicil was then drawn and duly signed and witnessed. It begins: "This is a third codicil to my last will and testament which is dated the twenty-eighth day of May, 1909." It then devises and bequeathes to Mrs. Stewart and her daughter \$10,000 each, in addition to any sum bequeathed to them by the said will or any codicil thereto, and ends thus: "In all other respects I confirm my said will." Hylands then asked that a new list of the legacies should be sent to him, and a statement of the mortgage moneys collected and deposited.

Mr. Esten took the will and codicils back with him to Barrie, attaching the third codicil to the will and the other codicils either at the testator's house or in the office at Barrie before the documents were placed in the will-box. A list of the legacies and a statement of the bank deposits to Hylands' credit were prepared by Mr. Esten and forwarded to the testator.

Early in December, 1915, Hylands again sent for Mr. Esten, who on the 6th went to Thornton, taking the will and codicils with him. Hylands expressed a desire to increase the gift made in the will to his son-in-law, the defendant Henry, and wished to have a conveyance made to him of certain lands. Mr. Esten suggested that the same result could be effected by a codicil to the will. The testator was quite satisfied that this should be done, and the fourth codicil was drafted, signed, and duly attested. The testator's capacity to make a will at the time is well established. The codicil is in the following words: "This is a fourth codicil to my will. I hereby give and bequeath the farm which I purchased from Mr. Fell to my son-in-law W. C. Henry, and in all other respects I confirm my said will and the three codicils I have made thereto."

Then follow the date, the signature of the testator, the proper attestation clause, and the signatures of the witnesses.

It will be observed that the first codicil expressly confirms the will of 1909, referring to it by date. The fourth codicil confirms the same will, although its date is not stated. The will of 1909 is the only will of the testator with "*three codicils . . . made thereto.*" No codicil was at any time made to the will of 1913.

It will also be noticed that the codicils of 1915 contain no express revocation of the will of 1913. Mr. Esten did not in fact learn of the existence of the will of 1913 until the occasion of the funeral of the deceased on the 18th or 19th January, 1916. Proofs to lead grant of probate of the will of 1909 were, as stated, filed on behalf of the executors. Mr. Cowan on his part prepared the necessary documents to obtain probate of the will of 1913; and the present suit followed.

Upon the facts as found, the sections of the Wills Act which affect the matters in issue are 23 and 25. Section 22 has no application. It does not prohibit a revocation by any presumption of intention, but only such a revocation "on the ground of an alteration in circumstances."

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Section 23 provides that "no will, or any part thereof, shall be revoked otherwise than as aforesaid provided by section 21" (not applicable here) "or by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing," etc.

One of the means by which a will may be revoked is by a will properly executed. As I read this section, it is in some writing other than a will, though required to be executed in the same manner, that an *intention* to revoke must be *declared*.

By sec. 2 (e), the word "will" in the Act is to be taken to include a codicil. Hence, by a codicil executed as the third codicil to the will of 1909 was executed, a will may be revoked, although the codicil contains no express declaration of such an intention.

Section 25 is substantially identical with sec. 22 of the Imperial Wills Act, 1 Vict. ch. 26. It refers to revival, as sec. 23 to revocation, and provides that a revoked will shall not be revived otherwise than by re-execution or by a codicil duly executed "and shewing an intention to revive."

The decisions of the English Courts as to revocation and revival are applicable in this Province, and a few of the many cases cited upon the argument may be usefully referred to. Others will be found in Theobald, 6th ed., p. 64; Williams, 9th ed., p. 164; and Jarman, 6th ed., p. 195.

In *In the Goods of May* (1868), 1 P. & D. 581, the first will was dated the 11th January, 1860. On the 18th August, in the same year, the testator married. After the marriage and on the same day he made a new will purporting to revoke the earlier will, which had been revoked by the marriage. Later, he tore off the signature to the old will. In 1861, he made a codicil, stated to be a codicil to the will of the 11th day of January, 1860. Sir J. P. Wilde held that there was no sufficient evidence on the face of the codicil itself that the testator entertained an intention to revive the will, as it was plain that in September, 1860, when he made the codicil, he considered the will of August to be the effective record of his testamentary disposition. "In a word," he says, "the codicil read by the surrounding circum-

stances of the case fails to shew the necessary intention." The Court granted probate of the will of August, with the codicil of July, 1861, and a subsequent codicil as to which no question was raised.

In *In the Goods of Wilson* (1868), 1 P. & D. 582, a codicil referred to a revoked will by date, but the relation between the codicil and a later will was so clear that the Court had no hesitation in affirming that it was to the later will that the testator intended the codicil to apply. Hence probate was granted of the codicil and the later will.

In these and similar cases the reference by date was regarded by the Court as *falsa demonstratio*—a clear case of mistaken description.

In the present case there is no question as to the document to which the codicils of 1915 apply. The will of 1909 was before the testator when both these codicils were made. Mr. Esten, when he went out to Thornton in February, brought with him the will of 1909. Whether the testator forgot the existence of the will of 1913 or not, he manifested, I find, when the third codicil was made, an intention to regard the will of 1909 as his last will. He had by him a list of the legacies it contained. He had also by him the will itself, un mutilated in any way. The will was read to him. He desired to increase, and did by the codicil increase, one of the legacies given by the will. As was said by Lord Hannen in *McLeod v. McNab*, [1891] A.C. 471, at p. 476, "the word 'confirm' is an apt word, and expresses the meaning, and has the operation of the word 'revive,' which is used in the statute." (The provisions of the Nova Scotia statute in question in that case are identical with those of sec. 25 of the Ontario Act.) By confirming the will of 1909, the testator revived it and made it a new will of the date of the codicil—the last will of the testator.

The fourth codicil refers undoubtedly to the same will. No other will of the testator had three codicils. Again was the will of 1909 confirmed in terms and circumstances that preclude the possibility of any mistake in description. The two codicils of 1915 manifest, in my opinion, a clear intention on the part of the testator—and nothing more is necessary in a properly executed codicil—to revoke the intermediate will as well as to establish the earlier one.

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Accordingly, there will be judgment declaring that probate should be granted—not of the will of 1913—but of the will of 1909 and its four codicils.

Costs of all parties out of the estate—those of the executors as between solicitor and client.

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June 5.

[MIDDLETON, J.]

KELLY v. O'BRIAN.

Infants—Money Legacy to Infants Domiciled in Quebec—Testator Domiciled in Ontario—Tutor of Infants Appointed by Quebec Court—Right to Payment of Legacy—Law of Quebec—Inter-provincial Comity.

Where a foreign guardian of infants is entitled by the law of the domicile of the infants to a fund of the infants in this Province, even where it is a trust fund under the control of the Court, the fund ought to be paid to him.

Thiery v. Chalmers Guthrie & Co., [1900] 1 Ch. 80, *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15, and *Fletcher v. Rodgers* (1878), 27 W.R. 97, followed.

A tutor duly appointed by a Court in the Province of Quebec for infants domiciled there was *held*, entitled to be paid a sum bequeathed to the infants by a testator domiciled in Ontario and dying there—the law of Quebec being that the tutor of infants represents them, and is authorised and bound to collect and get in all their property, even property outside of Quebec.

Hanrahan v. Hanrahan (1890), 19 O.R. 396, applied.

Re Lloyd (1914), 31 O.L.R. 476, explained.

ACTION by the tutor (appointed by a Quebec Court) of the infant defendants to recover from the defendants the executors of John Butler, deceased, the sum of \$8,000, which, by his will, the testator directed to be divided equally among the children of his late nephew Daniel Murphy. These children were infants, and were made defendants. The testator resided in Ontario, and died in Ontario on the 18th October, 1914. The infants were domiciled and resident in the Province of Quebec.

June 1. The action was tried by MIDDLETON, J., without a jury, at Ottawa.

M. J. Gorman, K.C., for the plaintiff.

C. G. O'Brian, K.C., for the defendants the executors.

J. F. Smellie, for the Official Guardian, representing the infant defendants.

June 5. MIDDLETON, J.:—The plaintiff is “tutor” of the infant defendants, and sues in this action to recover from the executors of the late John Butler the sum of \$8,000, which, by his will, the testator directed to be divided and distributed equally among the children of his late nephew Daniel Murphy, the infant defendants.

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Butler resided at the village of L'Orignal, and died there on the 18th October, 1914. The infants are domiciled and resident in the Province of Quebec; their father in his lifetime having lived at the village of Carillon, in the county of Argenteuil.

On the 5th February, 1912, proceedings were taken in the Superior Court before a Notary Public, by which the plaintiff was appointed tutor of the infants. According to the law of the Province of Quebec, the tutor of an infant represents the minor, and is authorised and bound to collect and get in all the property of the minor. Security is not required, but the property of the tutor stands charged in favour of the minor, and upon default the tutor is liable to imprisonment. The right and obligation of the tutor with respect to the personal property of the minor applies not merely to the property within the Province of Quebec, but to property outside the Province.

The law is fully discussed in the case of *Hanrahan v. Hanrahan* (1890), 19 O.R. 396—a case which is admittedly on all fours with this case save that there the fund originated from the estate of a testator domiciled in Quebec. The testator was here domiciled in Ontario.

I do not think that this makes any difference. The question does not relate to the estate from which the funds originate, but does relate to the rights of the tutor of the infants, and his rights depend entirely upon the law of the domicile of the infants. These infants residing in Quebec, it devolved upon the Legislature and the Court of that Province to care for the property of its wards, and inter-provincial comity demands that our Court should give full effect to the law of that Province and to the pronouncements of its tribunals upon a matter which is peculiarly within its jurisdiction.

In *Re Berryman* (1897), 17 P.R. 573, the present Chief Justice of Ontario recognised the *Hanrahan* case as finally disposing of all possible doubt concerning the status of the Quebec tutor, although

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he held that the Ontario Insurance Act, in speaking of "a guardian," referred only to a guardian appointed by a Surrogate Court of this Province.

In some earlier cases it had been assumed that our Courts ought to exercise a judicial discretion in determining the extent to which recognition should be given to the acts of foreign Courts with respect to the property of their citizens, and that we ought not to permit the handing over to foreign guardians of funds, out of the control of our Courts, unless satisfied that to do so was in the interest of the foreign subject according to our standards.

In England the situation was fully reviewed in the case of *Thiery v. Chalmers Guthrie & Co.*, [1900] 1 Ch. 80. There Mr. Justice Kekewich, notwithstanding the fact that in the earlier case of *In re Chatard's Settlement*, [1899] 1 Ch. 712, he had refused to recognise the rights of a French guardian without evidence that the money to be received would be used for the benefit of the infants, formulated very clearly the principle that, where the foreign guardian is entitled by the law of the domicile, the fund ought to be paid to him, even when it is a trust fund under the control of the Court; distinguishing this from his earlier decision upon grounds not readily apprehended.

The subject was further discussed by Mr. Justice North and the Court of Appeal in the case of *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15. After examining the earlier cases in which the discretion was supposed to exist, it is said (pp. 50 and 51) by Lindley, M.R., delivering the judgment of the Court: "A person absolutely entitled to trust money is entitled to have it paid to him or to any one duly appointed by him to receive it, and the trustees or the Court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the Court, acting for the trustees, has in the matter. . . . Here we are dealing with an alien domiciled abroad, and over whom the Courts of this country have no jurisdiction except such as is conferred by the fact that she has property here. All that the Court here has to do is to see that the

person claiming it is entitled to have it. . . . On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on him (the committee) by the Belgian Courts, unless lunacy proceedings in this country prevent them from doing so."

In the recent decision of *Re Lloyd* (1914), 31 O.L.R. 476, our Court did not have before it the authoritative decision from which I have just quoted; and cited, as being still the law, the language of Mr. Justice Kekewich in the earlier case. The *Hanrahan* decision is quoted with approval, and apparently the refusal to recognise the right of the Texas guardian was entirely based upon the fact that it was affirmatively shewn that that guardian intended to use the fund in a way that was not deemed proper.

It should be borne in mind that where a foreign Court deals with the estate of a domiciled Englishman, who is insane, asserting jurisdiction either by reason of his temporary residence abroad or his ownership of property abroad, the situation is entirely different, and the English Court, not being bound by comity to recognise the jurisdiction of the foreign Court over an English subject, has a discretion. This is pointed out in the case of *New York Security and Trust Co. v. Keyser*, [1901] 1 Ch. 666.

The tendency of legislation is entirely in favour of throwing the responsibility upon each country to care for its own citizens. See 4 Geo. V. ch. 21, sec. 67 (O.), authorising payment of moneys of foreigners to the consuls of their respective countries. This statute was preceded by proclamations issued by the Imperial authorities, which may be found reprinted in the Canadian Gazette.

The words of James, L.J., seem appropriate. He says: "The Courts of this country have no right . . . praising themselves . . . to say, 'We will administer the law better, and do more justice than the other Court will.' . . . Courts must respect each other:" *Fletcher v. Rodgers* (1878), 27 W.R. 97.

The judgment will therefore be for the plaintiff for the recovery of the money in question, out of which he may pay his own costs and those of the Official Guardian. The executors should pay their own costs out of the general estate of the testator.

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[MIDDLETON, J.]

June 7.

BANK OF OTTAWA V. CHRISTIE.

Promissory Note—Demand Note—Accommodation Endorsers—Advances by Bank—Defences to Action against Endorsers—Agreement for Payment—Evidence—Unreasonable Delay in Presentment—"Continuing Security"—Collateral Security—Assent of Endorsers—Bills of Exchange Act, sec. 181

A promissory note, dated in June, 1912, payable on demand, made by a mercantile company in favour of three of its directors, and endorsed by them to the company's bankers, the plaintiffs, was presented for payment in January, 1916, but not before:—

Held, in an action against the endorsers, that their defence based upon an alleged agreement, made at the time of the deposit of the note with the plaintiffs, and the making of advances thereon, that the note should be paid by the first money of the company deposited with the plaintiffs, it being known to the plaintiffs that the defendants were endorsers for accommodation merely, failed upon the evidence.

Held, also, that the note had not become paid on occasions where there was a balance exceeding the amount of the note to the credit of the company in its current account.

Held, also, that, with the assent of the defendants, the note was delivered to the plaintiffs as collateral or continuing security for advances made by the plaintiffs to the company upon its current account, and that at the time when the company made an assignment for the benefit of creditors, about a year before the presentment of the note, the amount due to the plaintiff upon the current account exceeded the amount of the note; and, therefore, the defendants were not excused by non-presentment within a reasonable time, so long as the plaintiffs held the note, according to the terms of its original deposit, as collateral security, with the privity of the endorsers.

Construction of sec. 181 of the Bills of Exchange Act, R.S.C. 1906, ch. 119.

Merchants Bank of Canada v. Whitfield (1881), 2 Dorion (Que.) 157, approved.

Chartered Mercantile Bank of India London and China v. Dickson (1871), L.R. 3 P.C. 574, distinguished.

ACTION upon a promissory note.

May 31. The action was tried by MIDDLETON, J., without a jury, at Ottawa.

Wentworth Greene, for the plaintiffs.

T. A. Beament, for the defendant Christie.

W. B. Northrup, K.C., for the defendant Staples.

G. E. Kidd, K.C., for the defendants *Craig et al.*, administrators of the estate of Edward Kidd.

June 7. MIDDLETON, J.:—The plaintiffs claim upon a promissory note, dated the 21st June, 1912, made by the Schwab Boiler Heating Company Limited in favour of Christie, Staples, and Edward Kidd, by which the company promised to pay the

sum of \$3,000 to their order on demand, with interest at the rate of six per cent..per annum from date until payment.

The note was not presented for payment until the 19th January, 1916, when it appears to have been duly presented and protested. The defence is that the note, being a demand note, ought to have been presented for payment and protested within a reasonable time, that the time which elapsed was entirely unreasonable, and that the endorsers are therefore discharged. In addition to this, the defendants Staples and the administrators of the estate of Kidd set up that there was, at the time of the deposit of the note with the plaintiffs, and the making of the advances thereon, an agreement that the note should be paid by the first money of the company deposited with the bank, it being known to the bank that the endorsers were endorsers for accommodation merely.

The last defence rests entirely upon the evidence of the defendant Staples, which is in conflict with the evidence of Christie. I have come to the conclusion that it is not well-founded.

I do not at all desire to suggest that Mr. Staples is intentionally stating anything untrue; but the whole probability of the case is entirely in favour of the story told by Christie; and I think that, after the lapse of time, the memory of Mr. Staples has played him false.

These three gentlemen were directors of the company. Notes had theretofore been discounted by the bank upon the faith of endorsements by the directors. As in no case had the company been ready to clear off the liability upon maturity of these notes, a good deal of trouble in procuring the endorsement of renewal notes resulted. It was finally arranged that upon the deposit of the note in question with the endorsement of the three directors, the \$3,000 should be placed to the credit of the company; and this accordingly was done. Mr. Christie says the understanding was that he, as managing-director of the company, should, out of the moneys of the company, pay off this liability as soon as possible. Mr. Staples, on the other hand, thinks that the bargain was one which was binding upon the bank that every dollar deposited should be applied upon this note, without any regard to the needs of the company for its current business. This is inherently improbable, for the whole object of the transaction was to enable the company to continue its business. A temporary

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advance would have been of very little use if it had to be wiped out by the deposits. What was sought was a line of credit.

It is also argued that this note had become paid because on two certain occasions there was a balance exceeding \$3,000 to the credit of the company in its current account. The company never directed the note to be charged against this balance; and, while no doubt the money to the credit of the company might have been applied in discharge of this note, it is equally clear that this would have immediately put the company out of business.

The first of these occasions was in December, 1912, when another note of the company fell due. A deposit was made against this maturing note, and when this had been charged up it left a balance just over \$3,000; but this balance was speedily absorbed by the cheques issued, so that in February, 1913, the account became overdrawn.

Then again, on the 20th November, 1913, there was a credit balance of over \$3,000 for a few days. This disappeared; so that, by the 20th December, the account was overdrawn, necessitating a further discount, and the account was from that time on overdrawn to the end of the chapter, which came in December, 1914, when the company assigned for the benefit of its creditors.

The truth seems to be that the company did considerable business in the west, expecting a large profit, but unfortunately this business turned out to result in nothing but losses. A few substantial and perhaps profitable contracts were secured, but the money received upon these contracts was absorbed in the outgoing incident to their performance. This is well shewn by a contract for some \$4,000, with respect to the Langevin block, which resulted in a cheque, received on the 25th July, 1914, for \$4,153. By the time this was received the bank account had become overdrawn to the extent of \$4,637, largely representing the wages and material going into this contract.

Thus the only substantial defence left is the one first indicated, the delay in presentation and protest. To this the plaintiffs reply that the case falls within the proviso of sec. 181 of the Bills of Exchange Act, which reads as follows: "If a promissory note payable on demand, which has been endorsed, is not presented for payment within a reasonable time the endorser is discharged,

provided that if it has with the assent of the endorser been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security."

This proviso is not found in the Imperial Act from which the section is taken, and there is little authority throwing light upon its construction.

The cases before the statute indicate that in what might be described as normal cases a promissory note payable on demand should be presented within a reasonable time if it is desired to hold the endorsers; yet, where a demand note was, with the knowledge of all parties, taken with the intention that it should be held as collateral or continuing security, the presentation for payment within what would otherwise be regarded as a reasonable time was something not contemplated by the parties.

In this case, I think, it has been clearly established that, with the assent of the endorsers, the note in question was delivered as collateral or continuing security for advances made by the bank to the company upon its current account, and that at the time of the failure of the company the amount due the bank upon this current account very largely exceeded the amount of the note. That being so, under the statute the bank was not obliged to present the note for payment, "so long as it is held as such security."

It is argued on behalf of the sureties that the note ceased to be held as a collateral or continuing security immediately upon the assignment being made by the company, and that it should then at once have been presented for payment, instead of being held, as it was, for a year. I cannot agree with this construction of the statute. The bank held this note as collateral security from the moment it was deposited in the bank, and so holds it to-day. There was no obligation to present it at any particular time. Although the transaction was in form a demand note with endorsers, it was in truth and in essence a contract of suretyship, and so, under this section of the statute, without the ordinary incidents of a demand note. The words "so long as it is held as such security" are not devoid of meaning, because, as soon as the bank had been paid off and the note was no longer held as security, it became once more a demand note, with all the incidents belonging to notes of that nature; and, if it was then desired to hold the endorsers, presentation for payment would have had to be made.

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Merchants Bank of Canada v. Whitfield (1881), 2 Dorion (Que.) 157, seems to be in point upon the main question. It was there held that a note payable on demand, given to a bank to secure an overdrawn account of the makers as well as to secure the forbearance of the bank for other advances, must be regarded in the light of a continuing guaranty, and that the endorsers of such a note are not relieved from their liability by the fact that the bank did not make a demand for payment till after the insolvency of the maker, about twenty-seven months after the date of the note. This is a decision of the full Court of Queen's Bench in Montreal, and its authority is all the greater because another branch of the case, that dealing with the right of successive endorsers *inter se*, was taken to the Supreme Court and to the Privy Council.

The case of *Chartered Mercantile Bank of India London and China v. Dickson* (1871), L.R. 3 P.C. 574, was one in no way based upon any statutory provision such as we have here; and it was held that a delay from February to December in the presentation of a promissory note payable on demand was not unreasonable so as to discharge the endorsers, where from the evidence it was shewn "that the note was meant to be, to a greater or less extent, a continuing security." Obviously this has no application where, as here, the time for which presentation may be postponed is prescribed by statute.

Cases shewing what would be a reasonable time for the presentation of a promissory note are of no value once the note is brought within the proviso of the section, if I am right in the construction I have placed upon it; that the endorsers are not excused by non-presentment so long as the banker holds the note, according to the terms of its original deposit, as collateral security, with the privity of the endorsers.

There will therefore be judgment for the plaintiffs for the amount of the note, with interest and costs.

[Appeals by three of the defendants from this decision were heard by a Divisional Court on the 4th October, 1916, and dismissed with costs. The reasons for judgment of the Divisional Court will be reported in due course.]

[APPELLATE DIVISION.]

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June 9.

MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Insurance—Accident Insurance—Bodily Injury—Accidental Means—Recurrence of Former Disease by Reason of Accident—Warranty of Health—Disability Caused Exclusively by Accident—"Total Disability"—Findings of Fact of Trial Judge—Appeal.

The judgment of MIDDLETON, J., 35 O.L.R. 280, affirmed. •

APPEAL by the defendants from the judgment of MIDDLETON, J., 35 O.L.R. 280.

May 10. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., for the appellants, argued that the accident was not the exclusive cause of the permanent disability. The tuberculosis of long standing in the plaintiff's system was another cause within the meaning of the policy, and the existence of that weakness was a breach of the plaintiff's warranty that he was in sound physical condition: *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591; *Fitton v. Accidental Death Insurance Co.* (1864), 17 C.B.N.S. 122; *Mardorf v. Accident Insurance Co.*, [1903] 1 K.B. 584; *Coyle or Brown v. John Watson Limited*, [1915] A.C. 1; *Youlden v. London Guarantee and Accident Co.* (1913), 28 O.L.R. 161; *Wadsworth v. Canadian Railway Accident Insurance Co.* (1912-14), 26 O.L.R. 55, 28 O.L.R. 537, 49 S.C.R. 115; *Smith v. Accident Insurance Co.* (1870), L.R. 5 Ex. 302; *Crandall v. Continental Casualty Co.* (1913), 179 Ill. App. 330; *Penn v. Standard Life and Accidental Insurance Co.* (1911), 158 N.C. 29; *National Masonic Accident Association of Des Moines v. Shryock* (1896), 73 Fed. Repr. 774; *New Amsterdam Casualty Co. v. Shields* (1907), 155 Fed. Repr. 54; *Binder v. National Masonic Accident Association* (1905), 102 N.W. Repr. 190, at p. 194; *White v. Standard Life and Accident Insurance Co.* (1905), 103 N.W. Repr. 735; *Ward v. Aetna Life Insurance Co. of Hartford* (1909), 123 N.W. Repr. 456. He also contended that the evidence shewed that there was not total disability; that the plaintiff could still perform several of the duties of his profession.

A. C. McMaster and *J. H. Fraser*, for the plaintiff, respondent, contended that the injury resulted, exclusively of all other causes

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than the accident, in the total disability of the plaintiff. The disease which intervened was not another cause within the meaning of the policy. The tuberculosis was in the system, but was harmless until, as the direct result of the bodily injury, it was given an opportunity to become active: *Clover Clayton & Co. Limited v. Hughes*, [1910] A.C. 242; *Thomas v. St. Louis I.M. & S. Ry. Co.* (1915), 173 S.W. Repr. 728; *Pacific Mutual Life Insurance Co. v. Branham* (1904), 34 Ind. App. 243; *Commercial Travellers Mutual Accident Association v. Springsteen* (1900), 23 Ind. App. 657; *Beare v. Garrod* (1915), 8 B.W.C.C. 474; *Barron v. Blair & Co. Limited* (1915), 8 B.W.C.C. 501. Counsel also submitted that there was evidence to support the findings of the learned trial Judge, and that these should not be disturbed.

June 9. MEREDITH, C.J.C.P.:—This is a case of much importance to the parties to it; but, being a case of accident insurance, which, unlike life insurance, is seldom, if ever, for long periods at a time, the case is not of so great general importance; for, if the ruling of the Court be not satisfactory to insurer or to insured, care can be taken so to frame future contracts that they may plainly give only that protection which is desired.

As this case now stands, the plaintiff is entitled to an income of \$7,800 a year, it may be (it is said) for life; and all the result of an insurance against accidents for one year, costing \$225, and an accident causing no more injury than a sprained wrist. It is quite clear that such results were never contemplated by either party; but it is equally clear that if the parties so contracted they must abide by their contract, irrespective of what steps may be taken by the insurers to avoid such results in the future.

In accident insurance there is no medical or surgical or other examination of the insured, as in life insurance. Instead of that, the insurer frames his contract of insurance in such a manner as he deems may save him from imposition and make him answerable only for such losses as he intends to insure against. In this case a warranty was taken from the insured; and the insurance, in so far as it is said to affect any question now involved, was limited to injury sustained through accidental means, resulting, directly, independently, and exclusively of all other causes, in an immediate, continuous, and total disability, preventing the

insured from performing any and every kind of duty pertaining to his profession.

The plaintiff fell from a sleeping berth in a railway carriage, and so sprained his wrist; that was the only immediate effect of the accident, and was an injury which ordinarily should have been quite recovered from in not many months; but the plaintiff's health and strength were at the time, and had been for a long time before, in such a condition that, instead of a rapid recovery, the plaintiff is yet, and it is said may be for life, in ill health, with an unrestored to health and strength arm, and inability to practise his profession.

It seems to me to be of no great consequence what the exact character of the latent physical weakness may have been; it was there, and it was started into activity, according to the evidence, by the accident. So the case seems to me to depend wholly upon three questions of fact: (1) Was the existence of that weakness a breach of the insured's warranty that he was in sound condition physically? (2) Is the accident the cause of the plaintiff's injury now existing? (3) Is the injury total disability?

The evidence seems to me to support the finding that that weakness at the time the insurance was effected was not within the meaning of the insured's warranty; that it was not that which would ordinarily be considered or called an unsound physical condition. It was, according to the evidence, a disease which had been healed, but which was more likely to recur than to occur if it had not existed before.

Regarding the first question, the cases of actions for negligence so much relied upon seem to me to be apt to hinder rather than help a true finding upon this question of fact. In them the question is not whether the negligence causing the injury was the direct, independent, and exclusive cause of it, but is whether it was a proximate or too remote cause of the injury—a very different question indeed. But it may fairly be found, upon the whole evidence, that the accident which happened was the exclusive cause of the injury from which the plaintiff still suffers, notwithstanding the fact that it would not have caused it but for the pre-disposition to such injury then, and perhaps always, existing in the insured.

Insurers may insist on warranties against the existence of any

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latent weaknesses or predispositions, or may limit the duration of the payments according to the character of the accident, or adopt other methods of saving themselves against unexpected results such as those which developed in this case; but I cannot say that that has been done by the terms of this policy.

The evidence proves a total disability. When a professional man is rendered incapable of earning anything in the practice of his profession—indeed, when rendered so incapable that it would be useless to attempt to carry it on for any practical purpose—it is a case, substantially, of total disability; and such a case was proved. Total disability such as makes it necessary to give up practice altogether is what the parties meant; they could not have meant that if a dollar a week, for instance, might yet be earned no benefit should be derived from the insurance.

No conclusion which is reached in this case can be reached with any high degree of confidence in its complete accuracy; it is impossible to find words, and to make terms and conditions, which must clearly cover all possible cases; and, when the unforeseen happens in such a way that it is impossible to say that, clearly, it does or does not come within such words, terms, or conditions, regard must be had to all the circumstances bearing upon the question; and sometimes, perhaps, the proper determination may depend on the question upon whom the onus lies. There are, however, fortunately, few cases in which it is impossible to tell whether the case is or is not within the words in question; seldom that a case fails because the parties have not expressed their contract in such words that they can be understood and applied to the case in hand.

And it by no means follows that because the plaintiff is able to recover to-day he must also be able to recover to-morrow: the cause of future may be different from the cause of present disability. The onus of proof that he is totally disabled, as before mentioned, and that that disability is the direct, independent, and exclusive of other causes, result of his accident, before mentioned, is always upon him; and the persistence of the disease, or other circumstance, may prevent to-morrow the proof he has been able to make to-day—proof that the to-morrow existing disability is caused directly, independently, and exclusively by the accident. He has proved sufficiently for the pur-

poses of this action, to-day, that but for the accident the phthisis would be dormant or otherwise ineffectual; and, that accident being the sole cause of its existing activity, it may, I think, reasonably be said that it is the sole, direct, independent, and exclusive cause of the plaintiff's present disability within the meaning of the words in the parties' contract. If the phthisis had been active at the time of the accident, if it had not been brought into activity by the accident, I do not see how it could reasonably be contended that, for any time beyond the usual duration of disability from such a sprain, damages could be recovered. Phthisis alone would drive the subject to the woods of Ontario, as the plaintiff has been driven, and should totally disable him from manipulating the noses, throats, eyes, and ears of patients; and there is nothing in the evidence to indicate that the plaintiff can yet practise his profession in any other profitable way. If without the exciting or depressing cause, whichever one may choose to call it, brought about by the accident, the disease would have asserted itself, either with or without another exciting or depressing cause, how could it be said that the total disability was not occasioned by the disease but that it was caused by the accident; and the onus of proof is, as I have said, always on the plaintiff.

This appeal is dismissed.

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Middleton (1916), 35 O.L.R. 280: and it involves an interpretation of a contract of very common occurrence. Were it a case of less importance, I should be content to adopt without further comment the conclusions of the learned trial Judge, and so dismiss this appeal.

But the advance of knowledge raises and will continue to raise novel contentions: and what is a commonplace at one time becomes a matter of great controversy at another. Until very recently the main ground of dispute of liability here would not have been thought of: or, if thought of, would have received scant consideration—but *tempora mutantur et nos mutamur in illis*.

The plaintiff, a doctor of medicine, a specialist in diseases of the eye, ear, nose, and throat, took out an accident policy with the defendants, an accident insurance company. In most accident insurance policies, the beneficiary is entitled only to payment for a

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limited time (usually one year or less), but this company finds its account in making its policies perpetual, that is, for the life of the patron who may be injured. No doubt, this forms a strong inducement to those desiring accident insurance, to prefer this company.

In the application, the duties of his occupation are described as "special work on eye, ear, nose, and throat," and the insurance was against "bodily injury sustained . . . through accidental means . . . and resulting directly, independently, and exclusively of all other causes in an immediate, continuous, and total disability that prevents the insured from performing any and every kind of duty pertaining to his occupation."

The plaintiff was thrown from an upper berth in a sleeping-car, and thereby sprained his wrist severely—it is not contended by the defendants that this was not an injury within the meaning of the policy—and, had the injury healed within a short time, no doubt the company would have paid the \$150 per week without demur.

But the injury did not heal, it is not yet healed, and it is doubtful whether it will ever be much improved—the company find themselves charged with an obligation to pay \$150 per week for years, perhaps until the death of the plaintiff; and hence they dispute liability.

I agree with my brother Middleton that there is no substantial basis for the defences set up originally: the plaintiff has acted properly in all respects, and the delay in recovery is no fault of his. Nor is there substance in the claim that the plaintiff is syphilitic—the cause of the delay in recovery must be sought elsewhere.

Several medical men of eminence were examined at the trial: without at all reflecting on any other, it seems to me that the evidence of Dr. Anderson gives the most satisfactory explanation. He says that some time ago, probably some ten or fifteen years before the accident, there had been a tuberculous condition of part of the pleura, probably the apex of the left lung: any tubercular mass had become encysted so as to leave no apparent disease—the patient would be quite well, wholly unconscious of any trouble, danger, or disease: and there would be no danger of another outbreak proceeding from the original disease.

But an accident happens, tissues are injured, a lessened re-

sistance to the "germs" occurs, these, otherwise innocuous, find a *nidus* into which to intrude and in which to become active.

"Q. An injury here produced a point of lessened resistance, and this tubercular condition, if it is present in that injury, is present because some germs that otherwise would never have demonstrated themselves at all had been stirred into life again—is that a fair way to put it? A. Well, I would put it the injury to the tissue first, and the germs secondarily.

"Q. Quite so? A. That is, that it produced a lessened resistance of these tissues that were injured, allowed the germs to become implanted and active again."

I can see no difference between this case and the case of an injury causing a break in the skin and thereby allowing some of the germs which are practically always and everywhere floating around to enter and set up a similar condition. How is a "lessened resistance" of tissues, without a breach of continuity of the skin allowing germs which may be in the blood to enter and set up or continue an inflammatory condition, different from a lesion of the skin allowing similar germs which may be in the air to enter with the same result? In the latter case counsel for the appellant in *Brintons Limited v. Turvey*, [1905] A.C. 230, at p. 231, admitted that the disability would be caused by the accident, "if there had been an abrasion by accident and the bacillus entered through the abrasion."

Until a comparatively recent day no one knew anything about the tubercle bacillus, and such affections as are now known (so far as such matters are known) to be due to the invasion of a bacillus were supposed to be due to exposure to the air. Would any one in that state of theory—knowledge if you will—say that the air was a contributing cause of the disability? And is the meaning of words to be changed by the change of medical theory?

We must interpret this document on common sense principles: no one could, when obtaining accident insurance, imagine that he was guaranteeing the company against the presence, accidental and temporary or otherwise, of tubercle bacillus or any other bacillus or spirillum in his system. We must interpret the language of this contract "in its ordinary and popular meaning. The use of language preceded scientific investigation:" *per* Lord Halsbury, L.C., in *Brintons Limited v. Turvey*, [1905] A.C. 230, at pp. 232, 233.

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That this disability has as a cause the accident, cannot be disputed. In *Drylie v. Alloa Coal Co. Limited*, [1913] Sess Cas. 549, a miner was, by reason of an accident to a pump, compelled to stand for some time in cold water, exposed to a current of cold air. This reduced his vitality and permitted the pneumococci which are everywhere, to overcome the resistance of the tissues: pneumonia set in and the man died. The arbitrator held that the pneumonia was caused by the occurrence; and, of the seven Judges, six agreed with him—Lord Salvesen alone thinking that there must be some direct lesion. This case was approved in *Coyle or Brown v. John Watson Limited*, [1915] A.C. 1, by the House of Lords. In that case a miner was exposed to a cold current of air which “brought on pneumonia,” and it was held that the death was the result of the exposure.

I do not know of any difference between the case of a tubercle bacillus and a pneumococcus—it is said you cannot have tuberculosis without the former or pneumonia without the latter. And I can see no difference in law between an accident weakening the power of resistance of the tissues and allowing the pneumococcus to enter and an accident of another kind weakening the power of resistance of the tissues and allowing the tubercle bacillus to enter—the bacillus of either kind could not fairly be called a cause within the meaning of this policy.

It is to be noticed that in both the pneumonia cases, the coccus did not enter by any external lesion, but attacked the tissues in the same way as the bacillus in the case now under consideration.

The case of *Brintons Limited v. Turvey*, [1905] A.C. 230, contains much of value. A workman engaged in sorting wool contracted anthrax, which caused his death. “According to the medical evidence and theory,” an anthrax bacillus passed into his eye, thereby infecting him with that terrible disease, and causing his death. The County Court Judge held that the entry of the bacillus was an accident: his decision was affirmed by the Court of Appeal and the House of Lords. Lord Halsbury gives examples of what he would call accidents (p. 234): “A workman . . . spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas—a definite disease: some trifling injury by a needle sets up tetanus.” No one in the pre-

sent state of medical science doubts that erysipelas and tetanus are germ-diseases like tuberculosis, pneumonia, and malaria.

In answer to the argument or suggestion that the condition of the plaintiff's bodily system was a contributing cause, I asked, "Suppose the plaintiff were 'a bleeder'—of the hæmorrhagic diathesis, as the technical expression runs—so that a trifling lesion would produce (in the sense of being followed by) excessive hæmorrhage, long continued, almost impossible to check, could it be argued that the diathesis was a contributing cause to the continued disability?" Surely such conditions of the body are conditions also, in the logical sense of the word, and not causes.

I adopt also the illustration of Mr. Justice Middleton, p. 285 of the report in 35 O.L.R.

The appeal cannot succeed on this ground.

Then as to the liability—in view of the "duties of his occupation" set out in the application, I think that the disability is total.

The appeal should, in my opinion, be dismissed with costs.

MASTEN, J.:—I agree.

LENNOX, J.:—This is an important case, as well on account of the large sums of money involved, if the plaintiff should live to be an old man, as the still more important question of determining the principle to be applied in construing insurance contracts of the character here in question.

The learned trial Judge has set out all the relevant provisions of the accident policy of insurance sued on. It is unnecessary to repeat them.

I have read the evidence, and carefully considered the cases referred to by counsel, and some others.

I am of opinion that the judgment in appeal is right, and for the reasons alleged by the learned Judge. I cannot usefully add anything to what is so clearly and cogently stated in the reasons for judgment of the trial Judge.

The appeal should, I think, be dismissed with costs.

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[APPELLATE DIVISION.]

April 1.
June 9.

SHARKEY V. YORKSHIRE INSURANCE CO.

Insurance—Live Stock Insurance—Construction of Policy—Proposal for Insurance—Delivery and Acceptance of Policy—Payment of Premium—Commencement of Period of Liability—Death Occurring after Acceptance, from Disease Contracted Earlier on same Day—Completion of Contract—Mala Fides—Term of Policy.

The plaintiff sued upon a policy issued by the defendants insuring her against the loss of an animal. She did not ask for or obtain interim insurance. By what was called a "proposal" for insurance, dated the 29th May, 1915, and signed by her, she applied for and obtained the policy, which was dated the 7th June, 1915, and was received by her early in the afternoon of the 8th June; about an hour later, she paid the premium; and the horse died about an hour after that, from an ailment contracted in the forenoon of the same day. The proposal stated that the defendants' "liability commences after payment of the premium and receipt of policy or protection note by the insured;" and she thereby agreed that her declarations therein contained should be the basis of the contract between her and the defendants, "subject to the conditions of the policy." That agreement was recited in the policy; and the contract of the defendants, as set out in the policy, was, that if, after receipt of the policy and payment of the premium for an insurance up to noon on the day of the expiry (the 7th September, 1915), the animal should during that period die from any accident or disease thereby insured against, occurring or contracted after the commencement of the defendants' liability thereunder, the defendants should be liable to pay to the plaintiff the sum insured:—

Held, that the defendants were not liable upon the policy, because the death occurred from disease contracted before the liability began.

Per RIDDELL, J.:—The proposal was not an offer, but a request to the defendants to offer a policy. There was no contract until the policy was offered and accepted.

Per MEREDITH, C.J.C.P., and RIDDELL, J.:—The plaintiff's lack of good faith in taking the policy and speedily paying the premium without informing the defendants of the changed conditions was fatal to her claim.

Judgment of LATCHFORD, J., who *held*, at the trial, that the policy was for three months and the death was during the currency of the policy, reversed.

AN action to recover the sum insured by the defendants in a policy of live stock insurance issued by them.

The action was tried by LATCHFORD, J., without a jury, at London.

Sir George C. Gibbons, K.C., and F. W. Wilson, for the plaintiff.
Oscar H. King, for the defendants.

April 1. LATCHFORD, J.:—On the 29th May, 1915, the plaintiff applied to James Peat & Son, the agents at Petrolia of the defendants, for insurance to the amount of \$1,000 on an imported Belgian stallion, valued at \$1,500.

All the written matter in the application, other than the signature of the plaintiff, is in the handwriting of a member of the firm of James Peat & Son, who, when dating the document, after it had been signed, observed that the blank after the word "Term" had not been filled in, and inserted "3 mos.," the term applied for. The blanks under "Table" and "Class of Section" were filled in before the application was signed, with the figures "3" and "1" respectively. When "Table 3" and "Section 1" are interpreted by reference to the endorsement on the application, they are found to refer to nothing but the insurance of stallions for a period of three months. The premium stated, \$32.50, was the proper premium for insurance of \$1,000 for a period of three months.

The application was duly forwarded to the head office of the defendants in Canada, at Montreal, and there received on the 3rd June. On the 7th June, the defendants mailed the policy of the same date on which this action is brought, to their agents at Petrolia. It was received there about two p.m. on the 8th June. Between four and five o'clock in the same afternoon, the defendants' agents delivered the policy to the assured, and were paid the premium. An hour or two later, the horse insured died. The cause of death was an acute disease, which first manifested itself on the morning of the 8th June.

It is admitted that in all matters relating to the insurance the plaintiff acted in good faith. An allegation to the contrary made in the statement of defence was withdrawn at the trial, where, indeed, no fact was in dispute. The contention of the defendants is, that, having regard to the contract expressed in the application and the policy, they are under no liability to the plaintiff.

They rely upon words appearing in what is termed a "note" inserted in the application, combined with the terms of the policy itself. The note is as follows: "The proposer is alone responsible for the correctness of the description and other particulars set forth in this proposal and declaration. If the whole or any portion of the same is written by a canvasser, agent, or employee of the company, or by any other person whatsoever, it is so written as agent for and on behalf of the proposer."

Nothing turns on this part of the "note." The agent in inserting "3 mos.," whether before or after the application was

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signed, acted for the plaintiff. The subsequent words are considered important: 'The company's liability commences after payment of the premium and receipt of policy or protection note by the insured.'

The policy, after reciting that the application or proposal had been made to the company, and that the assured had agreed that such proposal should be the basis of the policy and considered as incorporated therein, proceeds: "Now this policy witnesseth that if after receipt hereof and payment by the insured to the company of the under-noted premium of insurance up to noon of the date of the expiry of the policy, any animal described in the schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal, the company shall be liable to pay to the insured two-thirds of the loss which the said insured shall so suffer . . . not exceeding the amount for which such animal is insured.'

Then follow the name and colour of the horse, the sum for which it was insured, \$1,000, its "Table" (3), and "Section" (1), the amount of the premium, "\$32.50," and, under "Date of Expiry," 7th September, 1915.

On the face of the policy, under the heading "Definition of Tables and Risks Covered," appear the words "Table 3—All sections—Stallions against death from accident or disease during currency of policy."

The policy was certainly current from the moment when it was delivered to the insured and she paid the premium upon it. The stallion undoubtedly died during the currency of the policy. But the defendants say there is a limitation upon their liability in the case of death during the currency of the policy. If the death is from 'any . . . disease . . . contracted after the commencement of the company's liability' under the policy, their covenant obliges them to pay; but, by the "note" to the application or proposal, "The company's liability is to commence after payment of the premium and receipt of the policy by the insured, and the proposal is to be regarded as incorporated in the policy."

Section 154 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, which enacts that except where otherwise provided secs. 155

to 158 shall apply to every contract of insurance, destroys any defence based on the application.

Section 156, sub-sec. 3, provides that the proposal or application of the assured shall not as against him be deemed a part of or be considered with the contract of insurance except in so far as the Court may determine that it contains a material misrepresentation by which the insurer was induced to enter into the contract. Sections 194 to 201 do not, in this case, affect sec. 156, sub-sec. 3.

The proposal contains no misrepresentation of any kind. It cannot as against the assured be deemed part of the contract. The rights of the parties accordingly fall to be determined by the policy itself, upon the facts stated.

The term of the policy appears upon the face of the policy, as required by sec. 193, made applicable by sec. 235 to live stock insurance contracts. That term, conformably to the application and the date of the policy, coupled with the time and date fixed for the expiry, is for three months, ending at noon on the 7th September, and beginning, at the latest, at noon on the 7th June. The death was during the period between the time when the policy was brought into operation as a contract between the insurer and the insured, by the payment of the premium and the contemporaneous delivery of the policy, and the date upon which the insurance was to expire.

If there is an inconsistency between the words of the covenant "death from . . . disease contracted after the commencement of the company's liability hereunder" and the words in the definition of "Tables and Risks Covered" and "death from . . . disease during currency of policy," effect must, in my opinion, be given to the later words. The horse dying from disease during the currency of the policy, the defendants should pay the plaintiff's claim.

There will be judgment in her favour for \$1,000, with interest from the 7th August, 1915, and costs.

The defendants appealed from the judgment of LATCHFORD, J.

May 22. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

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W. N. Tilley, K.C., and Oscar H. King, for the appellants, argued that the horse had contracted the disease before "the commencement of the company's liability" under the policy, namely, before delivery of the policy to the plaintiff and before any premium paid. Therefore the appellants were not liable: *Provident Savings Life Assurance Society of New York v. Mowat* (1902), 32 S.C.R. 147, 156; *North American Life Assurance Co. v. Elson* (1903), 33 S.C.R. 383. The application was not an offer: the policy was the company's offer to the proposed assured, and only upon acceptance by the offeree would there be a complete contract.

Sir George C. Gibbons, K.C., for the plaintiff, respondent, contended that the company's risk began when the company accepted the plaintiff's application and wrote the policy, which, when delivered, related back to the day before. It was a policy dating from the 7th June at noon. Therefore the appellants were liable. The Court always leans against a forfeiture, and a policy is always construed against the insurer. In case of the non-existence of the subject-matter perhaps a different principle would apply. But here it was a question of when the risk commenced: Am. & Eng. Annotated Cas., vol. 9, p. 224; *Xenos v. Wickham* (1867), L.R. 2 H.L. 296; *Roberts v. Security Co. Limited*, [1897] 1 Q.B. 111.

Tilley, in reply, referred to *Henderson v. State Life Insurance Co.* (1905), 9 O.L.R. 540.

June 9. MEREDITH, C.J.C.P.:—The plaintiff seems to find it difficult to understand why she should not have had insurance from the time she sought it, or at least from an earlier day than that twice stated in, and once more upon, her "proposal" for the insurance in question; and, perhaps, that is quite natural, because in the more common applications for insurance, mainly fire insurance, the insurance generally does begin immediately and is evidenced by an interim receipt.

But the plaintiff did not ask for, or obtain, interim insurance, as her application shews she might have procured, evidenced by what is called a "protection note." By what is called a proposal for insurance, in which she is several times called, and to which she signed her name as, "proposer," she made application for and obtained the policy of insurance upon which this action is brought.

That proposal contains, over the signature of the plaintiff, the words: "The company's liability commences after payment of the premium and receipt of policy or protection note by the insured;" and the contract of the defendants, contained in the policy upon which this action is based, is: "that if after receipt hereof and payment by the insured to the company of the under-noted premium for an insurance up to noon on the day of the expiry of this policy, any animal described in the schedule below shall during that period die from any accident or disease hereby insured against as after mentioned, occurring or contracted after the commencement of the company's liability hereunder, and otherwise defined in the aforesaid proposal, the company shall be liable to pay to the insured . . . " as thereafter, in the policy, is provided.

In the proposal the plaintiff agreed that her declarations therein contained should be the basis of the contract between her and the defendants, "subject to the conditions of the policy;" and that agreement is recited in the policy.

The animal insured was an entire horse, intended to be employed in the service of about 100 mares, in three or four townships, during a season beginning on the 1st May and ending on the 1st August.

The proposal is dated the 29th May, and the policy the 7th June, 1915. The policy was delivered to and received by the plaintiff early in the afternoon of the 8th June, and the premium was paid apparently about an hour afterwards; the horse died soon after that payment, probably an hour; and died from an ailment, said to have been pneumonia, of which he was so sick in the morning of that day that two veterinary surgeons had attended him.

In these circumstances, the plaintiff contends that she is entitled to be paid, under the terms of the policy, for the loss of the horse; a contention which seems to me to be based a good deal upon a confusion of the commencement of the company's liability under the policy with some contended-for retrospective effect arising after "the commencement of the company's liability under the policy."

It is quite true that the defendants might, by the policy, have contracted to pay for the loss of the animal at any time before

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or after the policy came into effect; but no reasonable person would suggest that he did; nor would he suggest that they would contract to pay for the death of a horse that was fatally stricken by disease, whether known or unknown to the insured, when the policy came into effect.

Insurance companies do not, in such cases as this, examine the animal insured; instead of that, they guard against insuring dying, or diseased, horses—that is, diseased horses which may die during the currency of the policy, of the disease existing when the insurance becomes an effective contract—by explicitly providing that they shall not be liable for the loss of any animal dying from any disease except a disease contracted after the commencement of their liability.

Lack of honesty, or mistake, on the part of the insured, is thus pretty effectually guarded against. The insured knows from the proposal signed by him that the company's liability commences only "after payment of the premium and receipt of the policy . . . by the insured;" and by the policy that no liability is incurred except in respect of disease "contracted after commencement of the company's liability." Reading these two provisions together, I fail to see how the plaintiff can reasonably contend that she has a good cause of action against the defendants; even if she were not confronted with lack of good faith in taking the policy and speedily afterward paying the premium without informing the defendants of the changed conditions. No one could expect to get insurance upon the horse in question in the condition he was known to be in when the premium was paid—within an hour or so of his death.

The trial Judge found in favour of the plaintiff in this way: he first considered the policy one for three months ending at noon on the 7th September, 1915, and so beginning at noon on the 7th June; all of this being based upon a marginal note made by the defendants' local agent, in the plaintiff's proposal, in which the word and figure "3 mos.," after the printed word "Term." appear; although there is nothing in, or on, the policy upon the subject except the filling in upon a form in it, under the words "date of expiry," the words "7th September, 1915," and the provision which I have read for insurance "up to noon on the day of the date of the expiry of this policy." From that he then took

the long step of concluding that the policy gave retroactive effect in regard to anything happening after noon on the 7th day of June, that is to say, that the policy really came into effect as life insurance of the horse at that time, notwithstanding the provision that the company's liability did not begin till the insured had received her policy and paid her premium; the provision contained in the policy as to the commencement of liability; and the further provision, also on the face of the policy, under the heading "Definition of Tables and Risks Covered," in these words, "Stallions against death or disease during currency of policy." It could hardly be said that the policy was current before it came into existence as a binding contract between the parties; if it were, it would bring about this absurd result, that the defendants must pay though the horse had died before the policy came into force, that is, that the defendants insured the plaintiff against the death of a horse already dead, and all this merely because there is some evidence that originally the local agent, of whose authority in that respect there is no evidence, put in the margin of the proposal the figure and the abbreviated word I have read. And, notwithstanding that, if the judgment in appeal be right, the same result would follow if the plaintiff had not received the policy nor paid the premium for days or weeks after the 7th June, 1915; and though the insured is required to give notice directly to the company—not to an agent—of illness of the insured animal within 24 hours, and immediately call in a veterinary surgeon, of all of which without the policy the insured would know nothing, and would need to do though the policy might never come into force by delivery and payment of premium

But it seems to me to be quite too plain for serious argument to the contrary that, where the parties have agreed, as they have in this case, that "the company's liability commences after payment of the premium and receipt of policy or protection note by the insured," and that the company shall be liable only in case of death from disease contracted "after the commencement of the company's liability," there cannot be liability for death from disease contracted before the company's liability so began.

The appeal must be allowed; and the action dismissed.

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RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Latchford, and (in my opinion) it turns on a neat point of law.

The facts of the case are few and are set out with accuracy and sufficient detail in my learned brother's reasons for judgment.

In the view I take of the case, there is no need of considering the application of the statute law or anything other than what appears in black and white on the face of the documents.

What is insured is "any animal . . . (which) shall during that period die from any . . . disease . . . contracted after the commencement of the company's liability hereunder," "that period" being "up to noon on the date of expiry of this policy," and the "date of expiry" being stated as "7th September, 1915."

The animal contracted the fatal disease after the policy was signed for the company at its office in Montreal, but before delivery to the plaintiff, and there was no previous payment of premium, interim receipt, etc., to affect the question.

What seems to me the fallacy which runs through the contention of Sir George Gibbons is the hypothesis that the plaintiff by her application offered a contract to the defendants, which was accepted by the defendants by their writing and signing a policy of insurance—therefore the contract was formed and the company's liability commenced with the signing of the policy.

That is not the legal position. The application is not an offer but a request to the company to offer a policy. The company may decline altogether or may accede to the request. If they so accede, they write a policy and tender it to the proposed assured as the contract they are willing to enter into. If the assured accept the policy tendered, then and only then the contract is complete, and that is the "commencement of the company's liability" (the premiums being paid or other arrangements satisfactory to the company being made). "Then, and then only, was the contract formed. Then only was the respondent insured. All that had passed previously was preliminary:" *per* Taschereau, J., in *Provident Savings Life Assurance Society of New York v. Mowat*, 32 S.C.R. 147, 156. See *per* Lord Esher, M.R., in *Canning v. Farquhar* (1886), 16 Q.B.D. 727, at pp. 730, 731; May on Insurance, 4th ed., para. 43 H. There are cases where the mere dispatch by mail of the policy may be considered delivery, e.g.,

in *North American Life Assurance Co. v. Elson*, 33 S.C.R. 383. The application provided for a policy issued in the company's usual form, and the premium was paid in advance. Nothing of the kind appears here; the applicant calls herself "the proposer," no form of policy is specified, but she agrees that her statements are to be "the basis of the contract between" her and the defendants; no premium is paid.

It is to my mind plain that, when the agent tendered the policy to the plaintiff, she might have refused it and could not have been compelled to pay anything; and it is equally clear that the defendants could not have been obliged, in equity or otherwise, to deliver the policy.

I do not at all dispute the proposition that the wording of a contract may give it, as between the parties, any effect (not illegal), retroactive or otherwise; but here there is nothing but the precise words we are interpreting, and their meaning is not obscure.

Had the policy been expressed to be a three months' policy with the date of expiry the 7th September, a very strong argument could have been made that *ex necessitate* the beginning was the 7th June; but that is not the case.

I think then that the liability of the company did not begin (if at all) till after the fatal disease had been contracted.

Moreover, the material alteration in the subject of insurance known to the plaintiff is fatal to her claim: May, para. 43 G.; *Canning v. Farquhar*, 16 Q.B.D. 727.

I would allow the appeal with costs here and below.

LENNOX, J.:—I agree that the plaintiff cannot recover. There was, in my opinion, a completed contract when the plaintiff accepted the policy, but she accepted in the terms therein set out, and these terms preclude her from recovering in respect of a disease contracted before the time of acceptance—the commencement of the company's liability.

MASTEN, J.:—I agree in the view just expressed by my brother, basing my conclusion exclusively on the interpretation of the words of the policy, which, I think, attached.

Appeal allowed.

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[APPELLATE DIVISION.]

May 3.

June 9.

RE NEWCOMBE V. EVANS.

Surrogate Courts—Testamentary Cause—Issue as to Validity of Will—Removal into Supreme Court of Ontario—Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 33—Value of Property of Deceased Testator Domiciled in Ontario—Real and Personal Property out of the Province—Inclusion of—Property Affected by Result of Action—Proof of Law of Foreign Country.

Section 33 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, permits the removal of a testamentary cause from a Surrogate Court into the Supreme Court of Ontario only when the property of the deceased exceeds \$2,000 in value:—*Held*, that that does not mean property in Ontario only, but all property of the deceased which may be affected by the result of the action.

And where the property in Ontario of a deceased person domiciled in Ontario was valued at about \$100 only, but his property in the State of Massachusetts (mostly realty) was valued at much more than \$2,000, an action in a Surrogate Court, in which a grant of probate of his will was sought and opposed, and a real question as to the validity of the will was involved, was removed into the Supreme Court, it being proved as a fact that, by the law of Massachusetts, where probate of a will has been granted by the proper Court in the country of the deceased's domicile, and application is subsequently made for probate in Massachusetts, it is not open to any one desiring to oppose the granting of probate in Massachusetts, to contest the will.

Order of LATCHFORD, J., reversed, upon new evidence admitted by the appellate Court.

APPLICATION by the defendant, under sec. 33 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, for an order for the removal into the Supreme Court of Ontario of a testamentary cause in the Surrogate Court of the County of Essex, arising out of the plaintiff's petition for letters probate of the will of John A. Newcombe, deceased.

May 2. The application was heard by LATCHFORD, J., in Chambers.

A. W. Langmuir, for the defendant.

H. S. White, for the plaintiff.

May 3. LATCHFORD, J.:—Application by the defendant, under sec. 33 of R.S.O. 1914, ch. 62, for the removal of the application for probate into the Supreme Court.

Sub-section (3) of sec. 33 prohibits the removal of any cause or proceeding "unless it is of such a nature and of such importance as to render it proper that the same should be disposed of by the Supreme Court, nor unless the property of the deceased exceeds \$2,000 in value."

The whole property of the deceased within Ontario, where it is said he was domiciled at the time of his death, is valued in the application for probate at \$105.25. In the State of Massachusetts he was possessed of personal property valued at \$900 and of realty valued at about \$24,000.

An affidavit is filed, made by an attorney at law of Haverhill, Mass., to the effect that when probate is granted by a court of the country in which the testator was domiciled at the time of his death, and an application is subsequently made for probate in Massachusetts, and a person desiring to contest the application "has not contested the grant of probate in the country of the domicile of the deceased person, it is too late to oppose the grant on any ground which may have been raised upon the application for probate in the country of domicile."

What the result would be where, as in the present case, the sister and only next of kin of the deceased is contesting the application, does not appear.

As a general rule the law of the *locus rei sitæ* applies to realty, and only personal property is affected by a foreign probate. The total value of the personal property of the deceased, here and abroad, is much less than the amount mentioned in sec. 33. I am inclined to regard the words in sub-sec. 3 "the property of the deceased" as meaning his property over which the Surrogate Court has jurisdiction—property within Ontario; but, whether I am right in this opinion or not, the application fails on the ground that the case is not of such a nature and of such importance as to warrant the interference of this Court.

It was observed in *Re Pattison v. Elliott* (1912), 3 O.W.N. 1327, that where a fair case of difficulty is made out, so that there will be a real contest, the case should be removed if the amount of the estate brings the case within the statute. No such case is made here.

The motion is dismissed with costs.

The defendant appealed from the order of LATCHFORD, J.

May 22. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. W. Langmuir and A. H. Foster, for the appellant, argued that, in view of a new affidavit filed which shewed that a grant of

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letters probate by the Ontario Court would be accepted by the Massachusetts Court, there could be no doubt that the property in Massachusetts would be affected by probate in Ontario, and should be considered in determining the value of the property of the deceased. Therefore the case should be removed to the Supreme Court of Ontario: *Re Pattison v. Elliott*, 3 O.W.N. 1327.

H. S. White, for the plaintiff, respondent, contended that the words "the property of the deceased" in sub-sec. 3 of sec. 33 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, meant his property over which the Surrogate Court had jurisdiction, namely, property in Ontario: Halsbury's Laws of England, vol. 27, p. 163, sec. 310. Real property is exclusively subject to the laws of the State within whose territory it lies, so an Act of the Ontario Legislature would not extend to lands abroad: Maxwell on the Interpretation of Statutes, 4th ed., p. 223.

Langmuir, in reply.

June 9. MEREDITH, C.J.C.P.:—No good reason has been given for the plaintiff's persistent opposition to the defendant's efforts to have this case removed from the Surrogate Court of the County of Essex into the Supreme Court of the Province, under sec. 33 of the Surrogate Courts Act.

The proceedings in the Surrogate Court were begun by the plaintiff for the purpose of obtaining probate of the paper writing in question as the last will of her husband, who died recently.

The paper writing purports to be the last will of the husband and to give to the plaintiff absolutely all the property of which he died possessed, and to make her sole executrix of the will.

The property of which he died possessed is worth about \$30,000, comprising \$450 in "vehicles and equipment;" \$500 "money in bank;" \$45 "money in bank in Ontario;" and \$60 "wearing apparel and personal effects in Ontario;" all the rest of the estate being lands in the State of Massachusetts: the only part of the estate in Ontario being the \$105 worth expressly stated, in the application for probate, as above, to be in Ontario.

The defendant is a sister of the deceased, and opposes the propounded will on the grounds of mental incapacity of the deceased, and want of knowledge and approval of the contents of the will by him; and it is stated in the affidavit of the plaintiff

to lead grant of probate, as well as by the defendant, that, when the will was made, the deceased's property was in the hands of a "conservator," because of the deceased's incapacity, from some cause, to manage it.

So that a very real question as to the validity of the will is involved in this case, a question upon which the right to about \$30,000 worth of property depends: and so obviously, under ordinary circumstances, a case for a superior, not an inferior, Court.

And, besides that, the case is one which, no matter what the result of this appeal might be, the defendant could bring into the Supreme Court, under its statute-conferred jurisdiction "to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not."

But it is contended, and the Judge of first instance has favoured that contention, that the case does not come within the provisions of sec. 33 of the Surrogate Courts Act, because that section permits a removal of the cause only when the property of the deceased exceeds \$2,000 in value; and that that means property in Ontario only.

The words of the statute are not, however, "property in Ontario," but are merely "the property of the deceased;" and there is no good reason for such a qualification of them; though necessarily the property must be property that may be in some way affected by the result of the litigation; if it may be so affected, then its value, wheresoever it may be, should be counted.

Without evidence to the contrary, I should have held that all of the deceased's property might directly, or indirectly, be affected by an adjudication in this cause for or against the validity of the will—especially as to any rights of the parties to the cause: and a reference to any of the standard law books published in the United States of America gives more than merely support to that view; they shew an effect greater than those familiar with the laws of England chiefly might have expected: see, for instance, *Encyclopædia of Pleading and Practice*, vol. 10, pp. 1066, 1069.

And as to the law of the State of Massachusetts, it was said by Shaw, C.J., in delivering the judgment of the Supreme Judicial Court of the State, in the case of *Crippen v. Dexter* (1859), 13 Gray 330, 331: "It has long since been determined, as the law of

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this commonwealth, that one probate of a will only shall be allowed or admitted, as well in its operation upon devises of real estate, as on bequests of personal. In this last respect, it varies from the rule of the common law, which makes a marked distinction between a will of real, and one of personal estate. The importance of making proof of a will, once for all, and for all purposes, must be obvious. It determines the *status*, if it may be so called, the condition of a deceased person's estate. It must be settled as an estate testate or intestate. The establishment of the one necessarily excludes the other."

He then refers to the fact that with regard to devises of real estate the law of England is different from that of the State of Massachusetts; and, after referring to statutes of the State as to the effect of probate granted in another State, adds these words, among many other expressed in this important judgment (p. 332): "This statute does not in terms apply to a will made and proved in another state or country; but with other acts of legislation, it tends to confirm a general course of policy, to consider one effectual probate of a will, whether in our own or in a foreign state, according to the laws of such state, as conclusive and effectual, to all purposes." And to the same effect is the earlier case, in the same Court, of *Parker v. Parker* (1853), 11 Cush. 519.

I do not read this decision, of course, for the purpose of proving what the law of Massachusetts is; that, it need hardly be said, is still treated as a question of fact: but, in the absence of evidence—if there had been no affidavits—it might have been assumed that the law of Massachusetts is like that of this Province as to the effect of proof of a will upon the title to lands: and it is always some satisfaction to find, even from books which may not be evidence, that that which would have been assumed really is so, whether strictly proved or not.

If this were not so, it would be extremely unlikely that the plaintiff would insist on going to a trial of the question of the validity or invalidity of the will here, where there is only \$45 in the bank, and old clothing valued at \$60 to be administered; or indeed have sought probate here even under the "Estates of Small Value" provisions of the Surrogate Courts Act—see sec. 73.

Instead of in any way restricting the application so as to affect only the property, said to be of insignificant value, in Ontario,

the plaintiff has set out in all her proceedings all the property of which the deceased died possessed, and in these contentious proceedings is seeking to establish a will which gives it all to her. Her pleadings are as broad as they can be.

And any question, of even a technical character, as to the effect of the litigation here upon the property in the State of Massachusetts, is set at rest, as far as this application goes, by affidavits of a Massachusetts attorney-at-law, one of which was filed upon the application in the High Court Division, and the other on this appeal: affidavits to which no answer has been made, proving the law of Massachusetts to be as I have already stated *prima facie* it should have been taken to be in so far as it accords with the law of this Province.

Without these affidavits, without proof to the contrary of that which they prove, I would have had no hesitation in making the order sought, and which now must go, removing the cause into the Supreme Court of this Province, under the provision of sec. 33 of the Surrogate Courts Act.

Under all the circumstances, the costs here and below may be costs in the cause.

The appeal is allowed accordingly.

RIDDELL, J.:—An appeal from an order of Mr. Justice Latchford.

The deceased John A. Newcombe, domiciled in Ontario, died having made what is claimed to be his last will and testament.

Upon probate being applied for in the Surrogate Court of the County of Essex, it was made to appear that he had within Ontario \$105.25, but in Massachusetts \$900 in personal property and about \$24,000 in real property.

His sister, the appellant here, opposed the grant of probate: and there is no pretence that there is not a real dispute, "a fair case of difficulty." Under these circumstances, the rule is, that "the case should be removed if the amount of the estate brings the case within the statute:" *Re Pattison v. Elliott*, 3 O.W.N. 1327; sec. 33 (3) of the statute, R.S.O. 1914, ch. 62, fixes the inferior limit thus, "unless the property of the deceased exceeds \$2,000 in value."

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I agree that property which can in no wise be affected by the will is not to be considered in determining the amount of "the property of the deceased" under this sub-section.

The affidavit before Mr. Justice Latchford was imperfect in not setting out definitely the result in Massachusetts of a grant of probate in Ontario; and, accordingly, my learned brother dismissed the application.

Upon argument of the appeal, we allowed a further affidavit to be put in, which heals the defect.

An attorney-at-law of Massachusetts, of many years' experience, swears that "where probate of the will of a deceased person has been granted by the proper Court in the country in which the deceased person was domiciled at the time of his death, and application is subsequently made for probate thereof in the State of Massachusetts, it is not then open to any one desiring to oppose the granting of probate in the said State of Massachusetts, to contest the will, as, under the law of the State of Massachusetts, if the person has not contested the grant of probate in the country of the domicile of the deceased person, or has contested the grant of probate in the said country unsuccessfully, then, in either event, he or she is precluded from contesting the grant in the State of Massachusetts upon any ground whatever."

Such being the fact, the property in Massachusetts will be affected by probate in Ontario, and should be considered in determining the value of the property of the deceased.

If I followed the strict rule as to costs, I should allow the appeal without costs, and direct the removal into the Supreme Court with costs in the cause as of a simple motion; but, under the circumstances of the case, costs here and below may be in the cause.

LENNOX and MASTEN, JJ., concurred.

Appeal allowed.

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March 14.
June 9.

MONCUR V. IDEAL MANUFACTURING CO.

Fraud and Misrepresentation—Sale of Property of Company—Fraudulent Misrepresentations by Officers—Purchase by New Company—Insolvency of—Action by Liquidator for Rescission—Inability to Make Restitutio in Integrum—Fraud Practised not upon New Company but upon Shareholders—Damages for Deceit—Liability of Incorporated Company.

An action brought by the liquidator of a company for the rescission (on the ground of fraud) of contracts, made by W., the organiser of the company, and transferred to the company, for the purchase of the property of the defendants, also an incorporated company, and for general relief, was dismissed (MEREDITH, C.J.C.P., dissenting), on the ground that rescission was impossible, as there could be no *restitutio in integrum*, and that the defendants could not be cast in damages for fraud or deceit, because there was no evidence that the company in liquidation was deceived or that W. was deceived, and the fraud was practised upon the individual shareholders who purchased from W., and their right of action must be asserted by them individually.

Judgment of MIDDLETON, J., affirmed.

Per MEREDITH, C.J.C.P., and RIDDELL, J., that it is not the law that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit;" that proposition rests upon a dictum in *Western Bank of Scotland v. Addie* (1867), L.R. 1 H.L. Sc. 145, 166, 167; and is not in accord with such cases as *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, and *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351, 358.

Per MEREDITH, C.J.C.P., that the company represented by the plaintiff were induced to buy by the fraud of the defendants' officers or servants; and the defendants, having taken advantage of that fraud to effect the sale, could not avoid the effect of it as fraud.

ACTION by the liquidator of the Nagrella Manufacturing Company Limited for a declaration that a certain mortgage made by that company to the defendants was invalid on account of fraud, for an injunction restraining the defendants from assigning the mortgage, to compel replacement of a sum of \$15,000 paid and payment of interest, and for indemnity.

February 17 and 19. The action was tried by MIDDLETON, J., without a jury at Hamilton. The action of McANDREW v. NAGRELLA MANUFACTURING COMPANY was tried at the same time.

C. W. Bell and T. B. McQuesten, for the plaintiffs.

M. J. O'Reilly, K.C., and C. V. Langs, for the defendants the Ideal Manufacturing Company.

Z. Gallagher, for the defendants the Nagrella Manufacturing Company.

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March 14. MIDDLETON, J. (delivering judgment in both actions):—That the statements made by Mr. Fletcher and the letter given by Mr. Main were intended by Mr. Fletcher to induce subscribers to take stock in the Nagrella Manufacturing Company, and were false and misleading, there can, I think, be no doubt.

Mr. Main probably had no evil intention, and failed to realise the real nature of his acts and the use to which his letter would be put; but to take this charitable view of his conduct taxes to the very limit the credulity and charity of the judicial mind, and causes amazement at the simplicity of mind of an “auditor” who seems to enjoy some large measure of public confidence.

McAndrew is entitled to be relieved of his subscription for stock in the Nagrella Manufacturing Company—his action having been brought, as I understand it, before the winding-up began.

The other action seems to me to be misconceived. The fraud was practised upon the individual shareholders who purchased from Welsh, and their right of action has to be asserted by them individually.

Neither Welsh nor the company was, so far as shewn, the victim of any fraud, and the liquidator cannot assert the rights which the shareholders as individuals have against Fletcher.

Though Fletcher and the Ideal Manufacturing Company are in many aspects identical, yet in law they are separate, and nothing was shewn to make the company answerable for his deceit.

It is not now possible to rescind the contract. Matters have gone too far, and there can be no restitution.

In the result the Moncur action should be dismissed without costs, and McAndrew’s action should succeed with costs.

In the Moncur action, the plaintiff appealed from the judgment of MIDDLETON, J.

May 26. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

C. W. Bell and *T. B. McQuesten*, for the appellant, argued that the defendants were liable for the deceit of their agent by which the contracts were brought about: *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351. There had been

three definite and specific misrepresentations, namely: (1) the Ideal company had been very successful; (2) had paid 76 per cent. dividend; (3) had a surplus of \$15,000. The contracts should be rescinded.

M. J. O'Reilly, K.C., for the defendants, respondents, contended that the Ideal company in their corporate capacity could not be called upon to answer in an action for deceit: *Western Bank of Scotland v. Addie* (1867), L.R. 1 H.L. Sc. 145. The Ideal company had sold before the alleged frauds. Nor was it shewn that the representations were relied upon.

June 9. RIDDELL, J.:—In 1913 and prior thereto, the defendants were conducting a manufacturing business in Hamilton. One William Alexander Welsh, who is said to have been the proprietor of an employment bureau, was ambitious to become a promoter, and procured from the defendants, on the 13th August, 1913, an option on their property, land, buildings, etc., for \$25,000. Apparently he then had in view a project of obtaining English money for the scheme. He had a company incorporated, on the 6th September, 1913, under the name of "The Nagrella Manufacturing Company Limited," "to manufacture and deal in safes, cash registers, kitchen cabinets, and other domestic articles and specialties." It is quite clear from all the facts that it was the purpose and intention to acquire the defendants' business. The capital stock was \$2,500 shares of \$100 each.

On the 12th September, Welsh obtained from the defendants an option for \$5,000 upon certain patent rights. On the same day, an organisation meeting of the company (Welsh and four associates) was held, and by-laws adopted, amongst them one making 1,125 of the shares preferred stock.

The new company then (the 19th September, 1913) took an assignment of Welsh's options, giving therefor the 1,375 shares of stock which remained common stock.

Welsh, still president of the company, on the 18th October, 1913, caused a prospectus to be filed in the office of the Provincial Secretary (sec. 101 of the Ontario Companies Act, R.S.O. 1914, ch. 178), and proceeded to sell some of his shares.

On the 26th August, he had procured letters from Fletcher, the president and general manager of the defendants, and Main, their auditor, which contained statements concerning the business

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of the defendants that were misleading. It requires a great stretch of charity to acquit Main of wrongdoing; and no charity can, I think, acquit Fletcher. These letters were incorporated by Welsh in the prospectus filed. He sent copies of the prospectus to some persons and shewed it to others.

By means of this prospectus and the glowing letters of Fletcher and Main contained therein, Welsh was able to sell shares to Bruce Murdock in November, James Murdock in November, 1913, and February, 1914, and to E. W. Nichol and Albert E. Petty in November, 1913.

The Nagrella Manufacturing Company failed, and a winding-up order was made. The plaintiff, as liquidator of the company, sues the defendants substantially for rescission of the contracts entered into in pursuance of the acceptance of the options, and for general relief.

Rescission is impossible, as there can be no *restitutio in integrum*; and the only question now open is as to damages for fraud—in other words, does a common law action lie here for deceit?

Assuming that the defendants would be liable for the fraud of their agent Fletcher, the fraud; so far as the evidence goes, was practised on the persons already named as purchasing stock from Welsh; and the learned trial Judge has reached the proper conclusion when he says: "The fraud was practised upon the individual shareholders who purchased from Welsh, and their right of action has to be asserted by them individually."

So far as the Nagrella Manufacturing Company is concerned, I can find no evidence that it was misled or that Welsh was misled. If it had been so, there would have been no difficulty in proving it; but Welsh was not called nor any of his associates; no one connected with the company gives evidence.

It seems to me clear "that the statements made by Mr. Fletcher and the letter given by Main were intended by Mr. Fletcher to induce subscribers to take stock in the Nagrella Manufacturing Company," and that "neither Welsh nor the company was, so far as shewn, the victim of any fraud," as the learned Judge finds. I would dismiss the appeal on that short ground.

Had it been otherwise, I cannot agree that the law is as seemed to be contended: i.e., that "an incorporated company cannot in its

corporate character be called on to answer in an action for deceit." This supposed proposition of law rests upon a dictum of Lord Cranworth's in *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145, at pp. 166, 167, partially but guardedly supported by Lord Chelmsford in the same case. This quite overlooked the case of *Denton v. Great Northern R.W. Co.* (1856), 5 E. & B. 860, and cannot be considered law in the light of such cases as *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259 (*Cam. Scacc.*); *Mackay v. Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; *Swire v. Francis* (1877), 3 App. Cas. 106; *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351; cf. *Bowstead on Agency*, 5th ed., pp. 353, 354; *Halsbury's Laws of England*, vol. 1, p. 214, para. 454; *Pollock on Torts*, 9th ed., pp. 305, 314, 315.

The learned Judge has indeed said: "Though Fletcher and the Ideal Manufacturing Company are in many respects identical, yet in law they are separate, and nothing was shewn to make the company answerable for his deceit." But the learned Judge had given the true ground for refusing relief, in the preceding paragraph, where he said that "neither Welsh nor the company was . . . the victim of any fraud."

LENNOX, J., concurred.

MASTEN, J.:—I have had the opportunity of perusing the judgment of my brother Riddell, and I concur in the result at which he has arrived, and have nothing to add except that I would base my judgment exclusively on the conclusion of the trial Judge that "the fraud was practised upon the individual shareholders who purchased from Welsh, and their right of action has to be asserted by them individually," and on the conclusion of my brother Riddell that "so far as the Nagrella Manufacturing Company is concerned, I can find no evidence that it was misled or that Welsh was misled."

With respect to the further proposition that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit," I would desire to consider the cases very carefully for fear of stating the proposition too broadly.

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MEREDITH, C.J.C.P. (dissenting):—All persons concerned in the trial of this action seem to have been under the erroneous impression that the law in regard to fraud of incorporated companies is as in the dicta of the two law Lords who considered the case of *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145, it was said to be: and accordingly it was held that the plaintiff cannot have damages from the defendants for the deceit which it was found their servants had practised upon the company now represented by the plaintiff; and that he could not have the transaction in question set aside, on account of such fraud, because unable to make that which is called *restitutio in integrum*.

The oversight of the fact that the law is not as so expressed, and that any effect of such dicta has long been swept away by authoritative decision, plainly makes the judgment in question unsustainable: the well-established rule of law now being: that "with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business . . . no sensible distinction can be drawn between the case of fraud and the case of any other wrong:" *Hern v. Nichols* (1708), 1 Salk. 289; *Barwick v. English Joint Stock Bank*, L.R. 2 Ex. 259, 265; and *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351, 358.

That being so, the plaintiff should now have judgment against the defendants in such manner as may be best fitted to give relief from the loss which the company he represents sustained by the alleged fraud, if the findings of the trial Judge, as to such fraud, can be supported; and there is no difficulty in supporting them: that the company represented by the plaintiff in this action was induced to buy by fraud is well proved; and the defendants, having taken advantage of that fraud to effect the sale, cannot avoid the effect of it as fraud.

The best means of now doing justice between the parties is, in my opinion, by a reference to the proper local officer to ascertain and state what damages, if any, the company represented by the plaintiff sustained by reason of the deceit alleged in the pleadings; with a direction that judgment be entered up in accordance with the findings upon such reference, forthwith after the confirmation of the report thereupon; costs of the action and reference to follow the event, subject to any of the Rules of Court that may be

applicable to the case, but without costs of this appeal: so I would allow the appeal and let judgment go as indicated: but, my learned brothers being of an opposite opinion, the appeal is dismissed with costs.

The suggestion now made, and to which effect is now to be given in this Court: that the fraud of the defendants was practised upon those who became shareholders of the Nagrella Manufacturing Company, and not upon the company itself, has no weight in my mind—indeed it seems to me to be self-contradictory. What purpose could the defendants, or their officers, have in deluding such persons only? In order to accomplish the object of their deceit, it was necessary first to deceive the new company, and “unload” upon it their unprofitable and “hopeless” property and business; that being accomplished, it may, or may not, have been necessary for them, in order to ensure payment of the purchase-money of their fraudulent sale, to delude, or aid in deluding, persons to buy stock in the new company, but they had no other object in those fraudulent transactions.

It is quite immaterial whether Welsh was or was not a party to the fraud by which the new company was induced to buy its own insolvency, which was, and ought to have remained, the insolvency of the defendants. If the defendants made use of him, for a price, that but adds to their dishonest and disgraceful conduct; it does not make the new company itself any less innocent or less imposed on by the defendants—it but intensifies that imposition. Whilst, if Welsh were also imposed upon, the deceit of the defendants was only that much further-reaching.

Whether shareholders who were deluded by Fletcher's conduct, deluded into purchasing their shares in the new company, may have an action against him or against the defendants, is quite another question, and one which cannot properly be considered in this action: whether they have, or not, cannot affect the plaintiff's rights, whatever they may be. And there may be shareholders who did not buy their shares upon any misstatements of any one, who are injuriously affected only through the fraud practised upon the new company.

Unless it can be found that the new company itself was a party to the gross fraud that was practised upon it, the plaintiff must succeed in this action. It would be absurd to say that of

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it; to say other than that it bought in good faith, relying upon the written statements of the defendants' president and auditor, false statements made for the purpose of foisting upon the new company a business that was unprofitable and had already led to insolvency, and false statements which primarily were intended to lead and led to the purchase, innocently by the new company, of that business; and secondarily may have been intended to lead and may have led to the raising of the money by which part, at all events, of the price of it was paid.

But, if circumstantial evidence will not do, if the oath of some one, to the very fact, be desired, why dismiss the action, and perpetuate a wrong, or, if preferred, a possible wrong? Why not let the reference go, for upon it no damages can be assessed which are not there proved to have resulted from the fraud of the defendants practised upon the new company?

Appeal dismissed; MEREDITH, C.J.C.P., dissenting.

[APPELLATE DIVISION.]

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June 9.

CITY OF TORONTO v. MORSON.

Courts—Jurisdiction—Judicature Act, R.S.O. 1914, ch. 56, secs. 32 (2), (3), 119—County Court Action—Power of County Court Judge to Refer Case to Divisional Court of Appellate Division—"Prior Known Decision"—"Judge of Co-ordinate Authority"—Decision of County Court Judge in Division Court—Assessment and Taxes—Taxation by Municipalities of Salaries of Federal Officers—Powers of Provincial Legislature—Exemptions—Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (15)—Omission of Word "Imperial."

A motion for judgment, in an action brought in a County Court to recover municipal taxes upon the income derived by the defendant as the holder of a federal office, was referred by the Judge of the County Court, under secs. 32 and 119 of the Judicature Act, R.S.O. 1914, ch. 56, to a Divisional Court of the Appellate Division of the Supreme Court of Ontario, because the County Court Judge felt that he could not depart from a "prior known decision" (sec. 32 (2)) of another County Court Judge, in an action in a Division Court, between the same parties, and upon the same subject-matter, which he deemed to be wrong and of sufficient importance to be considered in a higher Court (sec. 32 (3)):

Held (MEREDITH, C.J.C.P., dissenting), that the County Court Judge presiding in the Division Court was not a "Judge of co-ordinate authority" (sec. 32 (2)) with the Judge of the County Court sitting in the County Court; and, therefore, there was no power to refer the motion, and the Divisional Court should dismiss it.

Semble, that, though all the Judges appointed and paid by the Dominion Government were disqualified by personal pecuniary interest from hearing this case, they became qualified *ex necessitate*, as in *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, and *Boulton v. Church Society of the Diocese of Toronto* (1868), 15 Gr. 450.

Per MEREDITH, C.J.C.P.:—The Judge presiding in the Division Court, being a Judge of a County Court, was a Judge of co-ordinate authority with the Judge who referred this case; and, even if that were not so, the objection did not go to the jurisdiction of the Divisional Court, which might hear the case as an appeal from a refusal to enter judgment: secs. 39, 45, and 46 of the County Courts Act, R.S.O. 1914, ch. 59. The case should therefore be considered.

Per MEREDITH, C.J.C.P., also:—The salaries of Judges or other federal officers are not exempt from provincial taxation: the Province has power to tax them, and has authorised the taxation. Section 5 (15) of the Assessment Act, R.S.O. 1914, ch. 195, considered with reference to the dropping of the word "Imperial," which was in the similar provision of the Assessment Act of 1904; and *Abbott v. City of St. John* (1908), 40 S.C.R. 597, referred to as binding authority.

MOTION by the plaintiffs for judgment in an action brought by the Corporation of the City of Toronto in the County Court of the County of Ontario, and referred by the County Court Judge to a Divisional Court of the Appellate Division.

The action was brought to recover municipal taxes in respect of the income of the defendant—the salary derived from his office as one of the Junior Judges of the County Court of the

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County of York; and the question raised was, whether a Judge or other federal officer can legally be assessed upon his income by the taxing authority of the municipality in which he resides.

May 26. The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Irving S. Fairty, for the plaintiffs.

R. A. Reid, for the defendant, raised the preliminary objection that the case was not properly before the Court, because the Judge of the County Court of the County of Ontario had no power under secs. 32 and 119 of the Judicature Act, R.S.O. 1914, ch. 56, to refer the matter to a Divisional Court. The decision of the Peel County Court Judge, given in a Division Court plaint, was not a "decision of any other Judge of co-ordinate authority." Therefore, the Ontario County Court Judge should have given his own decision.

Fairty, answering the preliminary objection, contended that the case was properly before the Court. It was the same "authority" which the Peel Judge had exercised, whether in the Division or County Court, and the Ontario Judge was right in sending it on.

Argument upon the merits was heard subject to the preliminary objection.

Fairty contended that the Province had the power to tax the incomes of the Judges of its Courts: *Abbott v. City of St. John* (1908), 40 S.C.R. 597; *Webb v. Outtrim*, [1907] A.C. 81; *Re County Court Judges' Income Assessment* (1914), 5 O.W.N. 657; *Dugas v. Macfarlane* (1911), 18 W.L.R. 701; Lefroy's *Canada's Federal System*, p. 417; *Clement's Canadian Constitution*, 3rd ed., pp. 641, 642. Moreover, the Province had authorised the taxation of these incomes: *Assessment Act*, R.S.O. 1914, ch. 195, sec. 5. Clause 15 of this section, before the revision of the provincial statutes in 1914, had contained the word "Imperial" between the words "His Majesty's" and the word "Treasury." But that word does not appear in the revision. That made no difference, however, he submitted, because the word "Imperial" must have been left out by some mistake. It could not have been the intention of the Legislature to leave it out.

Reid, in answer on the merits, relied upon the dropping of the word "Imperial" for his contention that the Legislature did not intend to tax the salaries of Judges: *Tully v. Principal Officers of Her Majesty's Ordnance* (1848), 5 U.C.R. 6; *Webb v. Outrim*, *supra*, as reported in 76 L.J.P.C. 25.

Fairty, in reply.

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June 9. RIDDELL, J.:—In this case we would consider ourselves disqualified except *ex necessitate*: but, there being no Judges who are not in like position, we must, if the matter calls for decision, follow the practice in *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, and in our own Court of Error and Appeal in *Boulton v. Church Society of the Diocese of Toronto* (1868), 15 Gr. 450.

I had hoped that the suggestion made at the hearing by the Court might be adopted, and a judgment accepted *pro formâ* that the case might be determined (as it should be) by the Judicial Committee (see *per* Girouard, J., in *Abbott v. City of St. John*, 40 S.C.R. 597, at p. 599); but counsel for the city refused to accede to this suggestion, as he had a perfect right to do. He is therefore entitled to our judgment on the merits if he is *rectus in curiâ*.

The case comes to us from the County Court Judge at Whitby on the following statement:—

"This is a case in which the plaintiffs, the Corporation of the City of Toronto, seek to recover from the defendant the sum of \$126.98, municipal taxes for the years 1912 and 1914, upon the income received by the defendant as a Judge of the County Court of the County of York. The defendant does not dispute the amount, but asserts that, as an official of the Dominion Government, he is exempt from such taxation.

"This action is in the nature of a test case, and is of great public importance, both to the municipalities of the Province of Ontario, and to Judges and other federal office-holders in the Province. A similar case was tried before His Honour Judge McGibbon in the First Division Court of the County of Peel, between the same parties, in the latter part of 1914, and in that action, which was an action by the present defendant to recover from the present plaintiffs the amount of certain taxes paid under protest, judgment was given in favour of the then plaintiff, but no reasons for judgment were given.

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"A recent case dealing with the question was heard before Mr. Justice Lennox, not, however, in his capacity as a Judge of the Supreme Court of Ontario, in which he held that the income of a County Court Judge was subject to taxation. The case is *Re County Court Judges' Income Assessment*, 5 O.W.N. 657, 25 O.W.R. 600; it reviews a number of leading cases on the subject.

"The reasons for judgment of Mr. Justice Lennox, in the case referred to, appeal to me strongly; and, as I have reason to doubt the correctness of the decision of His Honour Judge McGibbon in the case above referred to, I, therefore, by virtue of sec. 32 of the Judicature Act, R.S.O. 1914, ch. 56, refer this case to a Divisional Court."

But the defendant raises a preliminary objection—this we endeavoured to have him withdraw, but in vain. He stands on his strict rights also—and his rights must be given full effect to.

The powers of this Court are purely the creature of the statute: we have no power to decide the question submitted to us unless the statute gives that power. Section 119 of the Judicature Act, R.S.O. 1914, ch. 56, makes applicable to County Courts *mutatis mutandis* the provisions of sec. 32: sec. 32 provides: "(2) It shall not be competent for any Judge of the High Court Division in any case before him to disregard or depart from a prior known decision of any other Judge of co-ordinate authority on any question of law or practice without his concurrence. (3) If a Judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to a Divisional Court."

The "decision previously given" which the Judge must "deem . . . to be wrong" (see *In re Shafer* (1907), 15 O.L.R. 266, 273) is a decision by another Judge of co-ordinate authority—e.g., a Supreme Court Judge, would not consider himself at all bound by the judgment of a County Court Judge—nor would a County Court Judge be at liberty to do other than follow the decision of a Supreme Court Judge, no matter what number of contrary County Court opinions there might be.

A Supreme Court Judge faced by the judgment of another Supreme Court Judge, a County Court Judge faced by the decision of another County Court Judge, is in the position that if he dis-

approve the other's decision, he may refer the case before him to a Divisional Court (if of sufficient importance in his view). Here the learned County Court Judge deems the decision of Judge McGibbon to be wrong within the meaning of the words of the statute as interpreted in *In re Shafer*, 15 O.L.R. 266; and, if the statute forbade him to disregard or depart from it, he had the power to refer this case to us, and the preliminary objection should be overruled.

It is, however, argued by the defendant that the decision of Judge McGibbon was not that of a "Judge of co-ordinate authority:" sec. 32 (2). It is of course true that Judge McGibbon is Judge of the County Court of the County of Peel, but it is contended that, as his judgment was given not as Judge of that Court but as Judge of and in a Division Court, the judgment does not come within the words of the statute, "decision of any other Judge of co-ordinate authority."

Each Division Court is a separate court, a court of record (Division Courts Act, R.S.O. 1914, ch. 63, sec. 8), with its own seal (sec. 7), and its own official name (sec. 6)—the history of these courts begins with 32 Geo. III. ch. 6 (U.C.) (see an article "Some Early Legislation and Legislators in Upper Canada," 33 C.L.T. (1913), p. 23), and by 1841 they were much the same as at present so far as their constitution was concerned. Their jurisdiction is strictly statutory, and limited as the Legislature sees fit from time to time. The County Courts do not go back quite so far—they begin with 34 Geo. III. ch. 3, and by 1849 were in the same condition as at present (see the same article, 33 C.L.T., pp. 183, 184): they have a statutory name (County Courts Act, R.S.O. 1914, ch. 59, sec. 2), a separate seal (sec. 5), and are of course courts of record (sec. 2). Their jurisdiction is also purely statutory and limited.

Judges are appointed "Judges of a County Court" (County Judges Act, R.S.O. 1914, ch. 58, secs 2, 3, 8); these must be of seven years' standing at the Bar of Ontario; and Deputy Judges may be appointed (of three years' standing at the Bar) "for any county" (sec. 10). The Judges of the County Courts are appointed for life or until the statutory age-limit, and may not practise (sec. 9); the Deputy Judge for the county is appointed during pleasure, and may practise (secs. 11, 12).

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The County Court is presided over by a County Court Judge or the Deputy Judge.

The Division Court is presided over by "the Judge or the Junior Judge or by the Deputy Judge" (R.S.O. 1914, ch. 63, sec. 19)—"the Judge of the County Court" (sec. 19 (2)) or the Deputy Judge of the county. But "the Judge may appoint a barrister to act as his deputy" for not more than one month (sec. 20 (1), (3)).

As a rule, therefore, but by no means necessarily, the same person presides or may preside in the County Court and the Division Court. The Judge and the Junior Judge of the County Court and the Deputy Judge for the county may all preside over County Courts and Division Courts—and, in addition, a barrister appointed by "the Judge . . . to act as his deputy" may preside in the Division Court, but has no authority to preside in the County Court. Accordingly, the judgment in a Division Court may be given by one who could not preside in a County Court at all: nevertheless he has "all the powers and privileges vested in" the Judge "of the County Court so far as the Division Court is concerned;" and, if a judgment in the Division Court could ever be of avail as a binding authority, it is hard to see why it is not so as much when it is the judgment of one who is not a Judge of the County Court as when of one who is.

But, even if the Judge in the Division Court were always a Judge of the County Court, I do not see that the case is advanced at all. A Judge of the Supreme Court is the only person who can sit in Judge's Chambers—but it has never been considered that Weekly Court and Judge's Chambers are co-ordinate—a Judge sitting in Court is not bound by a decision in Chambers, although he would be were he sitting in Chambers.

I think that there is no "decision of any other Judge of co-ordinate authority" to hamper the Judge of the County Court of the County of Ontario, and that he should give his own opinion on the case submitted to him.

That being so, the case is not properly before this Court—and the motion for judgment should be dismissed, the plaintiffs to pay the costs.

As we cannot deal with the case, I do not think I should express any opinion on the law. I think, however, I should

state for the information of the trial tribunal the facts, so far as they can be obtained by diligent inquiry, concerning the omission of the word "Imperial" in sec. 5 (15) of the Assessment Act, R.S.O. 1914, ch. 195.

The word was not dropped by the revision committee, and was not intentionally left out by the officers in charge of the printing—it would seem that the omission was a mere slip in proof-reading, without the intention by any one to change the Act. I express no opinion as to the effect (if any) of a change such as this, made under such circumstances.

LENNOX, J.:—The questions of law arising in this action are of very great importance, and it is in the public interest that a judicial interpretation of the British North America Act touching these questions, and binding on all the Provincial Legislatures, should be obtained without unnecessary delay. I regret that the opinion I entertain as to the status of this action may combine to delay its immediate progress in the way proposed. Although my mind is not altogether free from doubt, and with very great respect, I am of opinion that the conclusion reached in the judgment of my brother Riddell, that the learned Judge of the County Court in which this action is pending had not, in the circumstances of this action, or by reason of the conflicting decisions referred to, power to reserve a case for the opinion of this Court under the provisions of the Ontario Judicature Act, sec. 32, and that we have no jurisdiction to give judgment upon the question referred, is right.

I may add that, in my opinion, the learned trial Judge was not, and is not, prevented from giving judgment by reason of the decision referred to.

In view of further steps, and the importance and far-reaching consequences of the questions involved, may I, without expressing or indicating any opinion either way, refer to sec. 33 of the Judicature Act and suggest that it may be well to consider whether notice should be given to the Minister of Justice or Attorney-General, or both, either now or at any later stage of the action?

MASTEN, J.:—After as careful consideration as I am able to give to this matter, I am unable to see that a Judge of the Division

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Court is of co-ordinate authority with a Judge of the County Court. The individual may be and often is the same, but in the one case his authority rests on the Division Courts Act and in the other on the County Courts Act, and in no meaning of the term, as I understand it, can these two jurisdictions be said to be co-ordinate.

The word "authority," as used in sub-sec. 2 of sec. 32 of the Ontario Judicature Act, seems to me the equivalent of "jurisdiction."

For this reason, I do not think that a County Court Judge of Ontario sitting as a Judge in the County Court is a Judge of co-ordinate authority with the County Court Judge of Peel sitting in the Division Court, and I do not think the former is bound by a prior decision of the latter, any more than a Judge of the Supreme Court of Ontario is bound by the decision of the Judge of a County Court.

If I am right in the above interpretation of sub-sec. 2 of sec. 32 of the Judicature Act, then sub-sec. 3 does not aid the corporation. The decision referred to in sub-sec. 3 is evidently the same decision as forms the subject-matter of sub-sec. 2, namely, a decision of a Judge of co-ordinate authority. The decision of a Judge of inferior authority need not be followed; a decision of a Judge of superior authority must be followed; and sub-sec. 3 is intended to provide for the situation created by sub-sec. 2.

Where, as here, both parties stand on their strict rights and demand the rigour of the law, I think it is our duty to accord it.

I would dismiss the application and remit the case to the County Court for determination. Having regard to all the circumstances, it is probably not a case in which to award costs.

MEREDITH, C.J.C.P. (dissenting):—This is a case in which every Judge, competent to hear it, is disqualified because of his personal pecuniary interest in the question to be determined in it, and so of necessity each Judge so disqualified becomes qualified, else the parties would be denied their right to a judicial determination of the very important matter in question between them; in these circumstances, it was naturally suggested to the parties that they accept a *pro formâ* judgment and pass on to some higher tribunal where no such, or any other, disqualifying circum-

stance exists; not because of any danger of the parties being in any manner prejudiced in this action by reason of any such disqualification, or of any man imagining anything to the contrary, but to relieve the Judges from a position which they would much rather not occupy: see *Thellusson v. Rendlesham* (1859), 7 H.L.C. 429. That, however, was not agreeable to the parties, and so the case must now be considered by us, a task by no means difficult, as the subject is somewhat threadbare after a good deal of litigation, upon the very question involved, in different Courts.

The first point for consideration is an objection to the regularity of the proceedings by which the case has been brought up from a County Court into this Court; but, whether regular or irregular, the case should be heard; the objection is not one going to the jurisdiction of this Court, but is one dealing only with the form in which that jurisdiction shall be exercised, whether as a case referred, or an appeal against a refusal to enter judgment, or against a judgment directed to be entered: and what substantial difference can it make, there being jurisdiction here equally in each case: what reasonable excuse can there be for sending the parties back to the County Court merely to come up again?

But I am also clearly of opinion that the case is now quite regularly here, as a case referred to this Court under secs. 32 and 119 of the Judicature Act; which provide for such a reference, by a Judge of a County Court, when there is a known decision of any other Judge of co-ordinate authority, which the Judge referring the case thinks wrong and of sufficient importance to be considered in a higher Court; and that is, in all things, just this case. The Judge referring the case is a Judge of co-ordinate authority with the Judge whose judgment is deemed to be wrong; he deems that judgment to be wrong, and this case to be, as it unquestionably is, of sufficient importance to be considered in this Court. The enactment in question does not require that the judgments shall be of equal quality in any respect, not even that the Courts, in which they are decided, shall be the same or similar. Why should it? What the enactment aims at is the overruling of one another by Judges, not Courts, of equal authority. What difference can it make whether the conflicting opinions are entertained in County, Surrogate, or Division Courts; the quality of the County Court Judge is just the same in whatever Court he may be exercising his power as such Judge? The enactment is

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explicit: a decision of any other Judge of the same rank. Every County Court Judge is a Judge of the same rank, with the same authority, as every other County Court Judge.

But, again, if this were not so, an appeal to this Court lies from the refusal of any County Court Judge to enter a judgment in any County Court case: see sec. 39 of the County Courts Act, R.S.O. 1914, ch. 59: and this case comes quite within that right of appeal; and there could be no excuse for sending it back to the County Court for consideration, all the facts necessary for its final determination being now before this Court: see secs. 45 and 46 of the County Courts Act. The case should, I think, be considered here.

Upon the merits of the case, there are but two questions involved, each of them purely a question of law: (1) has this Province power to tax the salaries of the Judges of its Courts: and, if so, (2) has it authorised the taxation of them?

The second question must, in my opinion, be answered in the affirmative. The 5th section of the Assessment Act, R.S.O. 1914, ch. 195, provides that all income "derived either within or out of Ontario by any person resident therein, or received in Ontario by or on behalf of any person resident out of the same, shall be liable to taxation," subject to a number of expressed exceptions. The only one of these exceptions, upon which an argument can be based that Judges' salaries are exempt, is No. 15, in these words: "The full or half-pay of any officer, non-commissioned officer or private of His Majesty's regular Army or Navy; and any pension, salary, gratuity or stipend derived by any person from His Majesty's Treasury, and the income of any person in such naval or military service, on full pay, or otherwise in actual service;" and the only ground upon which such an argument is based is, that this clause (15) of sec. 5 of the Act, before the revision of the statutes of the Province in the year 1914, contained the word "Imperial" between the words "His Majesty's" and the word "Treasury," and that that word was dropped from the sub-section in that revision.*

But what significance can there be in that? The clause deals only with Imperial matters, making the exemptions provided for in it, for doubtless sufficient, if not necessary, cause: and it is

*See the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 5 (14).

quite impossible that it could have been intended, in a consolidation of the statute-laws of the Province only, to make such a far-reaching change in such a manner. The powers of the revisers were conferred upon them by chapter 2 of 3 & 4 Geo. V. (O.), sec. 3 of which provides: "The commissioners in consolidating the said statutes may make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and may make such minor amendments as may be necessary to bring out more clearly what they deem to be the intention of the Legislature, or to reconcile seemingly inconsistent enactments, or to correct clerical or typographical errors; . . ." And the effect of their work is thus provided for in sec. 9: "The Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation of the law as contained in the Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted . . ."

The thorough and admirable manner in which the revisers exercised the power thus conferred upon them in the excision of superfluous words is shewn in the greatly reduced bulk of the two volumes containing the whole of the revised statutes; and it seems to me to be quite plain that to work of that character only is to be attributed the excision of the word "Imperial" formerly in sub-sec. 15.

But, quite apart from all such considerations, how can the words "salary derived from His Majesty's Treasury," even standing alone, be held to cover a Judge's salary paid under the Judges Act—R.S.C. 1906, ch. 138—such salaries being payable only "out of any moneys forming part of the Consolidated Revenue Fund of Canada." sec. 27: see also the British North America Act, 1867, secs. 102 to 106.

The public purse of both Province and Dominion has never been called His Majesty's Treasury, but has been and is called the Consolidated Revenue Fund. There is a Treasury Board of each, but that is as near as either gets towards the adoption of the word Treasury as a paymaster.

The term "His Majesty's Treasury" is distinctly Imperial, and quite inapplicable to a salary paid out of the Consolidated Revenue Fund of Canada, as the Consolidated Revenue and Audit Act makes very plain in the several references contained

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in it to "the Treasury" and "Her late Majesty's Treasury." And the drawings from Her and His Majesty's Treasury have been so widespread and so long-continued that no one should have any kind of doubt where it is or what it is. The Imperial statute-books are full of references to it, and sources of drainage from it.

The last point in the case would be a very difficult one but for the many decisions upon it, some one way but many more the other; and, as the Attorneys-General, after notice, do not desire to be heard on the question, we should, I think, now deal with it.

Has the Province of Ontario power to tax the salary paid by the Government of Canada, under the Judges Act, to a Judge residing in the Province?

The power of the Province to tax is contained in these words: "Direct taxation within the Province in order to the raising of a Revenue for Provincial purposes." The British North America Act, 1867, sec. 92, clause 2. But that power is expressly limited, by the same enactment, to this extent: "No land or property belonging to Canada or any Province shall be liable to taxation:" sec. 125.

There is a good deal to be said on each side of the question, but, as I have said, that good deal has been said over and over again and is readily accessible in the law books, so readily accessible that to repeat, even with variations, would be useless: it is enough for me to say that I feel bound to give effect, in this case, to that which was decided in the Supreme Court of Canada in the case of *Abbott v. City of St. John*, 40 S.C.R. 597, where in all things substantial the very question we are now considering was considered by that Court; leaving the parties to have it considered again, if they can, by a still higher tribunal.

But I may add that provisions of the British North America Act, 1867, such as: respecting the fixing of, and providing, salaries and allowances of the civil and other officers of the Government of Canada; and the fixing and providing the salaries, allowances, and pensions of the Judges—sec. 100—seem to me to have no substantial bearing upon the question, which, as it seems to me, must be whether, in this case, that which is substantially a reduction of the Judge's salary, is substantially a taxation upon money belonging to Canada, being money to be expended in a

sense in the service of the Province in its Courts mainly, and to some extent in the service of the Dominion. If these provisions prevent provincial taxation, they should prevent, for the same reason, federal taxation. But, as I have said, I cannot think these two last mentioned provisions have much, if any, bearing upon the real question—power to tax or exemption from taxation under secs. 92 and 125.

In my opinion, the plaintiffs should have judgment for the amount in question; the case is not one, in all its circumstances, for costs.

Motion dismissed; MEREDITH, C.J.C.P., dissenting.

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Judgment—Mistake in Judgment as Entered—Appeal from Judgment on other Grounds—Dismissal of Appeal by Consent—Subsequent Motion before Trial Judge to Correct Mistake—Jurisdiction of Trial Judge—Application to Appellate Court—Delay in Applying—Making Formal Judgment Conform to Judgment Pronounced—Solicitor's Slip—Order Relieving against—Terms.

The judgment of the trial Judge was pronounced on the 14th July, 1914. In the formal judgment, as drawn up and issued, there was inserted, as the defendants alleged, by slip or mistake, a word which was not justified by the judgment, and which made a material difference in the result. The defendants appealed from the judgment, but not upon any ground relating to the insertion of the word referred to. By consent of all parties, the appellate Court, on the 5th November, 1914, dismissed the appeal without costs. The mistake was afterwards discovered, and the defendants on the 11th December, 1914, applied to the trial Judge to amend the judgment; he refused to entertain the application. Nearly two years after the pronouncing of the original judgment, the defendants applied to the appellate Court for relief; and upon the application the plaintiff consented to its being treated as an appeal from the refusal of the trial Judge to entertain the motion:—

Held, that the Court had power to correct such a mistake; that the trial Judge was the most competent to do it, and was not *functus officio*; and, no substantial change having taken place in the position of the parties, that the defendants should be declared at liberty (upon terms as to costs, right of appeal, etc.) to apply to the trial Judge to correct the mistake alleged, so as to make the formal judgment conform to the judgment as pronounced; RIDDELL, J., dissenting.

Rules 521, 522, and 523, considered.

Prevost v. Bedard (1915), 51 S.C.R. 629, specially referred to.

MOTION by the defendants to amend an order of a Divisional Court of the Appellate Division, pronounced on the 5th

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November, 1914, dismissing, by consent of all parties, the defendants' appeal from the judgment of HODGINS, J.A., of the 10th July, 1914, noted in 6 O.W.N. 710.

The object of the motion was to procure an amendment of the judgment of HODGINS, J.A., as drawn up and issued, by striking out the word "higher" in reference to the rate of commission ordered to be paid to the plaintiff. The word "higher" was not in the judgment as pronounced.

On the 11th December, 1914, the defendants moved before HODGINS, J.A., to have that word struck out. The motion was refused; and the order refusing it was not appealed from. On the 11th April, 1915, an application to amend the judgment was dismissed by MIDDLETON, J., without prejudice to an application to a Divisional Court.

The defendants asked to have the consent order amended by adding a clause correcting the judgment by striking out "higher," and asked, also, for leave to appeal from the orders of HODGINS, J.A., and MIDDLETON, J., refusing to amend.

May 26. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., and *R. D. Moorhead*, for the defendants, argued that nothing had occurred since the trial-judgment was pronounced to alter substantially the position of the parties. The defendants should be allowed to have the formal judgment corrected so as to make it state what the Court actually decided, and intended to decide. There was ample power in the Court to grant this: *Quebec Jacques-Cartier Electric Co. v. The King* (1915), 51 S.C.R. 594, at p. 601; *Prevost v. Bedard* (1915), 51 S.C.R. 629; *Ainsworth v. Wilding*, [1896] 1 Ch. 673; *In re Swire* (1885), 30 Ch.D. 239; *E. v. E.*, [1903] P. 88; *Hatton v. Harris*, [1892] A.C. 547; *Mitchell v. Sparling* (1909), 1 O.W.N. 297, 15 O.W.R. 37; Rules 521, 522.

I. F. Hellmuth, K.C., and *J. H. Cooke*, for the plaintiff, contended that the Court could not allow the amendment; the trial Judge was *functus officio*; the position of the parties had substantially changed; and the rights of third parties had intervened. The judgment was a consent judgment; it could not be set aside when there had not been mutual mistake: *Davis v.*

Davis (1880), 13 Ch. D 861; *Wilding v. Sanderson*, [1897] 2 Ch. 534; *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51. If the judgment should be amended, then the defendants would have the right to appeal from it.

McKay, in reply.

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June 9. MEREDITH, C.J.C.P.:—The single question now involved in this application is: whether there is any power anywhere to consider now whether the formal judgment signed in this action on the 25th November, 1914, is or is not substantially the judgment pronounced in it after the trial of it.

For the applicants it is contended that it is not, and that such want of conformity means a loss of a good many thousands of dollars to them.

By the judgment in question, a reference was directed for the purpose of ascertaining how much is due from the defendants separately to the plaintiff for commissions upon the sales, made by him, of shares in the capital stock of the defendants; and, in regard to the applicants, the formal judgment directs that such commission shall be computed at the rate of twelve per cent., "or at such higher rate as" the applicants "may have paid to other similar agents similarly employed."

It is this provision of the judgment, respecting a higher rate, that the applicants especially object to: and there is nothing in the trial Judge's reasons for his judgment, or in the minute of the judgment endorsed upon the record, which seems to support it. In his reasons for the judgment pronounced the learned Judge said only that "the plaintiff is entitled to commissions at twelve per cent. or such rate as has been paid since" the 24th December, 1912, by the applicants.

Unless, therefore, there be some very good reason why the trial Judge may not now settle the question, as he might have done upon a motion to vary the minutes, the practice of the Courts is a reproach rather than a credit to them, in that respect.

But it is said that, if the facts are as the applicants contend, yet insuperable obstacles now prevent justice being done as it was really decreed; that the trial Judge is *functus officio*; that minutes of the judgment had been duly settled in the presence of the solicitors for all parties upon which the final judgment was

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signed; that the applicants appealed against the judgment pronounced at the trial and afterwards consented to a dismissal of the appeal, which was dismissed accordingly; and that nearly two years have elapsed since the signing of the judgment: but neither party has prosecuted the reference, nor has anything been done or left undone in the two years, or more accurately stated twenty-two months, to alter the position of the parties, substantially, in this respect: the appeal raised no such question as that involved in this application: it was launched some time before the form of judgment was settled: if such question had been involved in the appeal, the Court should have sent the parties to the trial Judge to have it settled by him, and the slip or mistake of solicitor or counsel in itself is no ground for a denial of justice. The parties really are as they were.

Nor can I think the trial Judge *functus officio*; the Court always has power to correct such slips or mistakes; and in such a case as this the trial Judge is the most competent Judge to do it: *Prevost v. Bedard*, 51 S.C.R. 629; *Oxley v. Link*, [1914] 2 K.B. 734; and *Pearson v. Calder* (1916), 36 O.L.R. 458.

The question is one of terms only; and, as the payment of all costs lost through the slip of the applicants' solicitor, will leave the plaintiff as well off as if the application to the trial Judge had been made before the signing of the judgment, justice requires, and no harm is done, by a consideration now of the question whether the formal order, by slip or mistake, is not what it should have been.

The trial Judge should entertain the application of these applicants to correct the slip or slips alleged; and should, in all substantial respects, make the formal judgment to accord with that which he pronounced, if it do not now so conform, upon payment of the costs which I have mentioned: and an order may go accordingly, the plaintiff having consented to this application being treated also as an appeal from the refusal of the trial Judge to entertain such a motion.

If there should be any such variation in the judgment, that is, any substantial variation, the right to appeal against the judgment will run from the time the change is made, and, in order to prevent any discussion over the point in the future, the order to be made on this application may be made subject to that term.

MASTEN, J.:—This is a motion made on behalf of the defendants the National Railway Association Limited, through their liquidator, having as its object the amending of the formal judgment pronounced in this action dated the 10th July, 1914, so as to make it conform to what was actually decided by the trial Judge, Mr. Justice Hodgins. In so stating the object of the motion, I omit reference to its technical form. In his reasons for judgment the trial Judge found that the plaintiff is entitled, as against the defendants the National Railway Association, to certain commissions for the sale of shares in that company; the words used by the trial Judge being as follows: "After the 24th December, 1912, the plaintiff is entitled to commission at twelve per cent., or such rate as has been paid since then by the defendants the National Railway Association to other similar agents, if any were employed."

The endorsement upon the record contains the following direction: "Judgment for the plaintiff, referring it to the Master in Ordinary to take an account against the National Underwriters Limited of the commissions on the sale of stock owned or controlled by that company in the National Railway Association, on the basis declared in written reasons for judgment, and as against the National Railway Association for an account of the commissions on the sale of their stock from and after the 24th December, 1912, on the basis declared in written reasons for judgment, and declaring the plaintiff entitled to such commissions on these respective bases herein."

By para. 3 of the formal judgment issued in pursuance of the foregoing, it is provided as follows: "This Court doth further declare that the plaintiff was agent of the defendant National Railway Association Limited, from the 24th day of December, 1912, and as such is entitled to recover from the said National Railway Association Limited a commission of twelve per cent. or at such higher rate as the defendant National Railway Association Limited may have paid to other similar agents similarly employed."

An appeal was taken by the defendants the National Railway Association Limited against the judgment pronounced by the trial Judge. The notice of appeal is dated the 15th day of September, 1914; and that appeal was, on the consent of the appel-

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lants' counsel, given in open Court, dismissed without costs on the 5th November, 1914. Subsequently, the solicitor for the defendants observed for the first time the variance now complained of; and on the 11th December, 1914, applied to Mr. Justice Hodgins in respect thereto. He was of the opinion that, as the defendants had appealed from the judgment on other grounds, he ought not then to interfere with the formal judgment.

On the 11th April, 1916, a further application was made to Mr. Justice Middleton, in Chambers, for the like purpose, and the motion was dismissed "without prejudice to any application that may be made to the Appellate Division of this Court," on the ground, as I understand it, that the only Court that could deal effectively with the application was the Court of Appeal.

On the hearing of the motion before us, counsel for the respondent agreed that this Court might completely and finally deal with the question, not merely by way of appeal from the decisions on previous applications, but also substantively, without waiving, however, the objections that there was no jurisdiction in any Court to amend the judgment at this stage, and that if there was jurisdiction it ought not to be exercised in the circumstances here shewn.

I am of opinion that it has been clearly shewn that the formal judgment does not accord with that which the trial Judge intended to decide, and did decide. That being so, the next inquiry is, whether the rights of either of the parties to this proceeding have been altered so that they cannot be restored to their original position, or whether the rights of third parties have intervened, based upon the existence of this judgment and ignorance of any circumstances which would tend to shew that it was erroneous. See the remarks of Lord Herschell in *Hatton v. Harris*, [1892] A.C. 547, at p. 558.

No facts have been put before the Court in the present case which would justify the Court in refusing to correct the error on this footing; and I am, therefore, of opinion, having regard more particularly to the cases of *Hatton v. Harris* (*supra*), *Prevost v. Bedard*, 51 S.C.R. 629, and the cases there referred to, that the jurisdiction ought to be exercised and the formal judgment amended so as to conform to what was actually decided.

With respect to the form in which the application should be

made, I would have been of opinion that it should have been made to a single Judge of the High Court, who, under the terms of the Judicature Act and the Rules, is entitled to exercise the jurisdiction of the Court, and I would have thought that the view expressed by Duff, J., in his dissenting judgment in *Prevost v. Bedard* was the correct view, and that an appellate tribunal had no jurisdiction to deal with the matter when the appeal before it was concluded, its jurisdiction being appellate only. That view, however, was not maintained in the Supreme Court, which entertained jurisdiction to deal with the question. Nothing, however, appears in that case, either expressly or impliedly, to negative the fact that there is jurisdiction in a Judge of the High Court, under the powers conferred by Rules 521, 522, or to negative the exercise by a single Judge of the inherent jurisdiction of the Court to make its formal decree agree with that which has been decided.

The case clearly differs from an application to rescind a judgment given by consent, on the basis that the consent was given in error. No jurisdiction, in the present circumstances, would exist to entertain such an application. These cases rest upon an altogether different basis and upon an altogether different principle. I refer as examples particularly to *Ainsworth v. Wilding*, [1896] 1 Ch. 673, and to *Attorney-General v. Tomline* (1877), 7 Ch. D. 388. With the principles set out in those cases I entirely agree, but it seems to me that they have nothing to do with this case, which is clearly an application to make the formal judgment conform with that which was actually decided. The fact that an appeal was taken and dismissed does not alter the character of the application here before the Court.

To alter the substance of the judgment as pronounced by the Court, whether on account of mistake in consent or otherwise, is one thing. To alter the form of the judgment so as to make it conform to the decision of the Court is another. The first is to relieve one party from a consent given under a misapprehension. The second is to effectuate the intention of the Court. By their appeal the defendant company sought to establish that in the judgment of the trial Judge manifest error had intervened. By consent that appeal was dismissed and his decision affirmed. But such dismissal ought not, I think, to be construed into an aban-

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donment of the right to have that which was actually decided, correctly stated in the formal judgment.

I concur in the judgment proposed by my Lord the Chief Justice.

LENNOX, J.:—I agree in the result.

RIDDELL, J. (dissenting):—The plaintiff, by writ tested the 26th May, 1913, sued the defendants for commission on sale of stock. The action was tried before Mr. Justice Hodgins, and that learned Judge, on the 10th July, 1914, endorsed the record: "Judgment for the plaintiff, referring it to the Master in Ordinary to take an account against the National Underwriters Limited of the commissions on the sale of stock owned or controlled by that company in the National Railway Association, on the basis declared in written reasons for judgment, and as against the National Railway Association for an account of the commissions on the sale of their stock from and after the 24th December, 1912, on the basis declared in written reasons for judgment, and declaring the plaintiff entitled to such commissions on these respective bases;" adding a provision for costs. A note of the reasons for judgment will be found in 6 O.W.N. 710-11.

The formal judgment was drawn up by the defendants. It provided for commission from the Underwriters A 1 20 per cent. prior to the 24th December, 1912, and after that date against the other defendants at "12 per cent. or at such higher rate as the defendant National Railway Association may have paid to other similar agents similarly employed." It will be observed that in the written reasons for judgment the word "higher" does not appear.

An appeal was taken from this judgment on several grounds: one of them being that it was "contrary to law and evidence and the weight of evidence." Upon this coming on for hearing, counsel for both parties agreed to the appeal being dismissed without costs.

The solicitor for the defendants then discovered the word "higher" in the formal judgment, and on the 11th December, 1914, moved before Mr. Justice Hodgins to have that word struck out. The motion was refused. No appeal was taken from the

refusal, no application was made to the Appellate Division, but the defendants' solicitor, after vain attempts to have the plaintiff's solicitor consent to amend the judgment, went into the Master's office, proceeded with the reference, took evidence, etc., and the case is now standing for judgment.

An application, made on the 11th April, 1915, to amend the judgment, was dismissed by Mr. Justice Middleton, and no appeal has been taken from that dismissal. It was without prejudice to any application that might be made to the Appellate Division.

The defendants the National Railway Association have set up in an affidavit by their solicitor that at 12 per cent. the plaintiff may possibly get \$25,275 commission, while at the rate they paid another agent he would get a much smaller amount; and they now apply for an order amending the consent order dismissing their appeal by striking out the word "higher" and, if necessary, for an order granting leave to appeal from the order of Mr. Justice Middleton and also from the order of Mr. Justice Hodgins.

In respect of the last two motions, I think with my brethren Hodgins and Middleton that they had no power to amend the judgment, and that nothing could be done for the defendants until the judgment on consent of the Appellate Division should be got out of the way.

This application then, in my view, is an application to amend or modify the consent judgment.

The case obviously does not come within Rule 521, nor, as I think, under Rule 522; and, if any Rule apply, it must be Rule 523. I assume, with some doubt, that, if what is alleged to be a mistake in a judgment appealed from is not discovered till after the appeal has been disposed of, this will be "matter . . . subsequently discovered," within the meaning of Rule 523.

A consent judgment can, no doubt, be got rid of on the same grounds as the consent agreement upon which it is based: *Great North-West Central R.W. Co. v. Charlebois*, [1899] A.C. 114, see p. 124; *Huddersfield Banking Co. Limited v. Henry Lister & Son Limited*, [1895] 2 Ch. 273, at p. 276. There is no sanctity about such a judgment, if there be any about any judgment, although of course a consent judgment has the same effect as any other

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judgment: *In re South American and Mexican Co.*, [1895] 1 Ch. 37. But it cannot be set aside except on grounds sufficient to invalidate the agreement itself. No case, I think, can be found where a consent judgment formally passed and entered has been set aside except on grounds which would invalidate the agreement itself, and there is express authority: *Attorney-General v. Tomline*, 7 Ch. D. 388, at p. 389, *per* Fry, J.: "When a consent order has been drawn up, passed, and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement." This has never been questioned, much less overruled. In other cases the language employed is in the positive and not the negative form.

Wilding v. Sanderson, [1897] 2 Ch. 534, at p. 544, *per* Byrne, J.: "A consent order may be set aside upon any of the grounds upon which an agreement can be set aside." *Huddersfield Banking Co. Limited v. Henry Lister & Son Limited*, [1895] 2 Ch. at p. 280, *per* Lindley, L.J.: "A consent order can be impeached . . . upon any grounds which invalidate the agreement it expresses in a more formal way than usual" (citing with approval *Attorney-General v. Tomline*). Lopes, L.J., at p. 283: "The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside." And he cites with approval *Attorney-General v. Tomline*, as well as *Davenport v. Stafford* (1845), 8 Beav. 503 (of no importance on this inquiry).

The agreement upon which the consent proceeded was this: the defendants agreed that the judgment appealed from should stand, on condition that the plaintiff should waive his chances of getting the costs of the appeal; and, unless that agreement can be got rid of, I do not see why that judgment must not stand.

A mere allegation that the consent was given inadvertently is of no avail: *Davis v. Davis*, 13 Ch. D. 861; there must be fraud (which is not here alleged) or mistake. The mistake must be mutual, or, if on one side only, must have been induced by what the other side did: *Wilding v. Sanderson*, [1897] 2 Ch. 534; *May v. Platt*, [1900] 1 Ch. 616; *Angel v. Jay*, [1911] 1 K.B. 666.

The mistake was not mutual: Mr. Hellmuth, the counsel for the plaintiff, whose word we accept without affidavit (following the usual practice both here and in England) repudiates any such

idea; and if, for any reason, this judgment should be set aside, insists on his right to appeal from the judgment we may substitute for it. Nothing done by the plaintiff induced the mistake, if there was one. Mr. McKay, whose word we also accept, I do not understand to go so far as to say that, had he known of the presence of the word "higher" in the judgment, he would not have consented to the dismissal of the appeal. Nothing of the kind appears on affidavit; the case made being that a junior of Mr. McKay's settled the judgment (there is no pretence that he did not know all about the judgment, it was stated and not denied that he drew it up). Mr. McKay "never noticed the mistake that had been made in the formal judgment," but there is no affidavit that it was by mistake or influenced by mistake that the agreement was made that the appeal should be dismissed.

The case is in some respects not unlike *In re West Devon Great Consols Mine*, 38 Ch. D. 51. In a winding-up proceeding, the Vice-Warden admitted certain claims, counsel for certain opposing contributories agreed that if their costs were paid he would not appeal. They then subsequently set up that this consent was given by mistake, the Vice-Warden having, they asserted, misstated the effect of a certain resolution, and they desired to be relieved from their agreement not to appeal. Cotton, L.J., said (p. 55): "The appellants had had full opportunity of becoming acquainted with the terms of the resolution, and cannot set up the case that they did not know them, as establishing a title to relief on the ground of mistake." Lindley and Bowen, L.JJ., agreed, as they did in another statement of Cotton, L.J. (p. 55): "The counsel in fact says: 'The Judge has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' That is a compromise." I think the agreement not to press an appeal on condition of not being asked for costs is as much a compromise as an agreement not to appeal at all on condition of receiving costs. No authority need be cited for the proposition that the Court will not, except in extreme cases, set aside a compromise. The text-books have many of them, and most are referred to in *Huddersfield Banking Co. Limited v. Henry Lister & Son Limited*, [1895] 2 Ch. 273, in argument or judgment.

Moreover, all that is known now in respect of the contents of the judgment was known a year and a half ago. The defendants

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proceeded with the reference, evidence has been taken before the Master, on the judgment as it stands. This is acquiescence in the judgment to some extent; and, while not conclusive against the application, it is not to be overlooked. If it be a matter of discretion, I should not exercise discretion in favour of the application; and there is, I think, no right to the order.

I would dismiss the application with costs.

Motion granted on terms; RIDDELL, J., dissenting.

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[APPELLATE DIVISION.]

May 1.
June 9.

BIRCH v. PUBLIC SCHOOL BOARD OF SECTION 15 IN THE TOWNSHIP
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Public Schools—Proposal of School Board to Purchase Site and Build School House—Money to be Raised upon Debentures—Public Schools Act, R.S.O. 1914, ch. 266, sec. 44—School Board Restrained from Purchasing until Approval of Ratepayers Obtained and Debentures Issued—Appeal to Inspector under sec. 54 (11)—Finality of Inspector's Decision.

Where a proposed new public school site and school building are not to be paid for out of the rates for one year, but out of money to be raised upon debentures under the provisions of sec. 44 of the Public Schools Act, R.S.O. 1914, ch. 266, it is necessary that the steps provided for in that section shall be taken. The school board has no power to create debts extending beyond the year without the sanction of the ratepayers and on debentures issued by the municipal council—the trustees cannot make a binding and unconditional contract to purchase or build until they are assured of the means to pay, through the issue of debentures. But the school board is not precluded from securing options on sites or from making contracts to buy conditional upon the lawful issue of the debentures necessary to provide the purchase-price.

Smith v. Fort William School Board (1893), 24 O.R. 366, and *Forbes v. Grimsby Public School Board* (1903), 6 O.L.R. 539, approved and applied to rural schools.

In an action by a dissatisfied ratepayer and a dissatisfied trustee against a rural school board, the other trustees, and the vendors of land which the board had assumed to purchase, it was held (RIDDLE, J., dissenting), that the defendants should be restrained from taking any action in pursuance of a resolution passed at a meeting of ratepayers, or otherwise proceeding towards the proposed purchase, unless and until the proposal for the raising of money by debentures had been submitted to and sanctioned at a further special meeting of the ratepayers, and until in pursuance thereof debentures had been duly issued.

The view that where the county public school inspector has heard and determined an appeal under the provisions of sec. 54 (11) of the Act, the jurisdiction of the Court is ousted, disapproved.

Arthur Roman Catholic Separate School Trustees v. Township of Arthur (1891), 21 O.R. 60, approved.

Per MASTEN, J.—The proceedings of the school board and the vote taken at the meeting of ratepayers were irregular and illegal; and there was no sanction for an application to the council.

MOTION by the plaintiffs to continue an interim injunction, and also for leave to appeal to the Supreme Court of Ontario from an order of the Judge of the County Court of the County of York.

April 29. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

Gideon Grant, for the plaintiffs.

W. D. McPherson, K.C., for the defendant school board.

R. G. Smythe, *W. B. McPherson*, *H. A. Newman*, and *F. H. Barlow*, for the other defendants.

May 1. MIDDLETON, J.:—The plaintiffs in this action seek to restrain the school board from proceeding with the purchase of a school site and the erection of a school building, upon various grounds, which, put shortly, resolve themselves into the contention that the proceedings at the meeting authorising an application to the council for funds were irregular and unfair, in that the questions were submitted in such a form as to preclude any vote against borrowing; and, secondly, that the purchasing of the lands and the entering into of the contract before any by-law had been passed by the township was irregular and improper.

Upon a motion for an interim injunction, Mr. Hellmuth, who then appeared as senior counsel for the defendants, objected that this Court had no jurisdiction, as the case was one falling within the provisions of sec. 20 (3) of the Public Schools Act, R.S.O. 1914, ch. 266. Mr. Grant, for the plaintiffs, on that occasion, did not seriously resist Mr. Hellmuth's contention, and accordingly I dissolved the interim injunction; retaining the action, however, so as to be satisfied upon the question raised by Mr. Grant that it might be found necessary to have a judgment in the action vacating certain conveyances if he succeeded upon his contentions before the County Court Judge in proceedings which he said he intended taking under the statute referred to.

Upon these proceedings being instituted, there was a change in the personnel of counsel, and Mr. McPherson, who succeeded to Mr. Hellmuth's brief, contended successfully before the County Court Judge that the section in question had no application to the matters in controversy. Mr. Grant now renews his motion in this Court, and Mr. McPherson asks that this action be dismissed;

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Mr. Grant at the same time seeking leave to appeal to the Supreme Court of Ontario from the order of the County Court Judge.

Before considering the statute and the cases, it is, I think, desirable to elaborate a little the precise matters involved. The question concerns the purchase of a school site. The school board selected a site, and a meeting of ratepayers was called to consider it. At this meeting, it is said, and not denied, the purchase of the selected site was approved. Without having obtained any by-law from the township, the trustees proceeded with the purchase, and subsequently a special meeting of public school supporters was called for the purpose of considering a proposal of the school board to apply to the municipal council for the issue of debentures for such amount as might be deemed adequate for the purpose of erecting a twelve-roomed school upon the selected site. At that meeting a vote was taken upon a question framed thus, "for the issue of debentures to the extent of \$87,500," and as an alternative "for the issue of debentures to the extent of \$22,500 for the purpose of paying for land already contracted for by the school board." The ratepayers were asked to sign either one or other of these, no opportunity being given to vote in the negative on either.

An appeal was had by the plaintiffs to the inspector under the provisions of sec. 54 (11); and, after considering the matter, the inspector determined that the proceedings were in substantial conformity with the Public Schools Act.

The theory presented on behalf of the majority was that the purchase of the land had been decided upon at the earlier meeting, and that the only question open for discussion at the meeting in question was, not "purchase or no purchase," but merely the purchasing and holding of the site on the one hand as against the purchase and erection of the building on the other.

Turning now to the statute, I think that the County Court Judge was right in construing sec. 20 (3) as he did. The attack is not made on the first meeting, at which the selection of the school site was adopted, and there is no by-law of the council of any municipal corporation yet in existence. This exhausts the jurisdiction conferred by that section of that statute, and I should not, therefore, give any leave to appeal to the Supreme Court.

Reliance is placed upon the decision of my Lord the Chancellor in *McGugan v. School Board of Southwold* (1889), 17 O.R.

428, for the contention that this Court has jurisdiction to declare the proceedings at the later school meeting invalid, in that the vital matter voted upon had not been properly placed before the meeting. I have had the privilege of conferring with my Lord upon this case, and he agrees with me in thinking that the aspect of the matter discussed before me was not presented to him. We think that where there is any complaint as to the proceedings at a school meeting the only remedy which those aggrieved have is an application to the inspector, and that his decision is final. Moreover, I am quite clear that, if there is an alternative tribunal, and it is open to the party who deems himself aggrieved to resort either to the Supreme Court or to the inspector, he cannot go first to one tribunal and then to the other. Having gone to the school inspector, the decision of the inspector is conclusive.

Furthermore, if I had jurisdiction to investigate the matter, I would, as at present advised, agree with the conclusion arrived at by the inspector. The purchase of the site had been determined upon at the earlier meeting, and all that remained to be done was to determine the amount which should be demanded from the township council for the purpose of completing the purchase and erecting the building if it was decided to erect a building.

One other matter remains for consideration. In the case of *Smith v. Fort William School Board* (1893), 24 O.R. 366, it was determined that a school board could not contract for the building of a school house until the necessary funds had been provided for the erection of the school. That decision was referred to in *Forbes v. Grimsby Public School Board* (1903), 6 O.L.R. 539, as establishing a salutary rule that the trustees should not undertake to build in excess of funds actually provided by the council.

With much deference, I am unable to see any foundation for reading into the Public Schools Act any such limitation. The section of the statute 45 (1) enables the school board to require the council to raise the money necessary for the purchase or enlargement of a school site and the erection of a school thereon; and I cannot see anything in the statute or any reason which compels the school trustees, if they can find vendors and contractors who will give them credit, to wait until the township has passed its by-law before making a contract for the purchase or erection. It is well established that the right of the school trustees to demand the amount they see fit to require, and compel

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the passing of the by-law and the raising of the money by the township, is absolute. This is the only question which remains to be disposed of in this action, and I think that I should turn this motion into a motion for a judgment, so that the question may now be finally disposed of; and, as I entertain the view above expressed with reference to the decided cases, it is my duty to enlarge the hearing of this motion before a Divisional Court, where these decisions may be reviewed.

If the view that I have expressed should prevail as against the decided cases, the action would of course be dismissed, but some consideration should be given to the question of costs, in view of the change of attitude of those representing the plaintiffs.

The motion was accordingly set down for hearing by a Divisional Court of the Appellate Division.

May 8. The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., for the plaintiffs, argued that the Court had power to declare the proceedings at the later school meeting irregular: *McGugan v. School Board of Southwold*, 17 O.R. 428. The school board had no power to contract for the building of a school house until the necessary funds had been provided for the erection of the school: *Smith v. Fort William School Board*, 24 O.R. 366; *Forbes v. Grimsby Public School Board*, 6 O.L.R. 539; *Re Toronto Public School Board and City of Toronto* (1901-2), 2 O.L.R. 727, 4 O.L.R. 468.

W. D. McPherson, K.C., for the defendant school board, and *R. G. Smythe*, *F. H. Barlow*, and *H. A. Newman*, for the other defendants, contended that the *Fort William* case did not apply, as urban schools were considered in that case, while the question here concerned rural schools. The cases were also different in their facts. The ratepayers had directed the school board to procure options, and, after meeting, the ratepayers had directed the carrying out of the purchase. It would have been a breach of trust on the part of the school board not to have carried out the purchase. The board had power, under sec. 45 of the Act, to require the council to raise the money by one yearly vote.

McKay, in reply, contended that the same principles applied to rural and urban schools.

June 9. MEREDITH, C.J.C.P.:—This is not an appeal, but a case referred to us under the provisions of the Judicature Act because the learned Judge who made the reference thought the case of *Smith v. Fort William School Board*, 24 O.R. 366, followed in the case of *Forbes v. Grimsby Public School Board*, 6 O.L.R. 539, was wrongly decided and ought to be overruled; and, accordingly, we are asked by the defendants to overrule the *Fort William* case, a case decided nearly 23 years ago, and a decision which, as far as I know, has never been called in question either in the law Courts or in legislative halls, although few judgments of consequence that are open to objection very long escape being called in question; and alterations in the law, especially upon questions affecting municipal corporations and public schools, in the legislation of this Province, are freely and frequently made; so that a ruling which stands so long unchallenged is hardly likely to have much that is objectionable in law or in fact in it; and is one that should not be disturbed unless plainly wrong.

Instead of that decision being plainly wrong, it appears to me to be plainly right.

The fundamental error, as it seems to me, underlying the opinion of the learned Judge who has thus reopened the question here lies in the assumption that a school board has power to compel the municipal council to issue debentures. The board has power to require the council to levy the amount required by the school board for all proper purposes, in the one year to which the board's estimates relate, but has no power to create debts extending beyond the year without the sanction of the ratepayers and on debentures issued by the township council, safeguards which the Legislature has necessarily provided.

It must be remembered that we are dealing with a public school, the board of trustees of which, to some extent, is changed every year, and so, almost necessarily, is not endowed with power except for special purposes and in the manner specially provided in the school laws, to incur debts which its successors would be obliged to pay: the general power is, to have found by the council means to meet the expenses of the schools under their charge, for the current year: sec. 73(o) of the Public Schools Act.

I feel bound to say that the judgment in the case in question seems to me to be as plain as anything can be, and that the statute is equally plain; indeed, it is difficult for me to

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perceive how this proposition could be made plainer: you, an annual board, cannot contract so as to bind yourselves and your successors in office for years to come, until you have done all that without which you cannot be sure of your legal power to make that contract binding; you cannot make a binding contract in a case in which you may really never have the right to make a contract; you cannot make a contract so as to bind the school board, whether you do or do not get or attempt to get the authorisation to make it which the statute requires; you can bind your successors only through debentures issued by the municipality; if you could make a binding contract, such as those in question, before the debentures were issued, you would bind them to pay for any breach of that contract though debentures should or could never be issued, and though indeed you should never attempt to get them. Take this case as an example: two of the Judges of this Court are firmly of opinion that the sanction of the ratepayers to the issue of the debentures has not been obtained; and, if the plaintiffs were not entitled to succeed upon a wider ground, it might well be that eventually it should be held, in this or some higher Court, that they are entitled to succeed on this ground also, that is, that the sanction of the ratepayers had not been obtained, and it might also be that it never could be obtained, and yet the contract would be valid and binding on future boards, as well as the present board; a state of affairs intolerable.

To refuse to overrule the case of *Smith v. Fort William School Board* is to hold that the plaintiffs are entitled to have the defendants restrained from taking any steps towards carrying out the contracts in question unless and until the necessary debentures are issued, the contracts not being conditioned upon the issuing of them in due course, and being contracts involving the expenditure of moneys extending over a number of years.

And so it may not be necessary to consider the other important questions argued before us, but it is advisable to do so, because the view of the main one expressed in the Court below seems to me to be entirely wrong; that is, that it is entirely wrong to consider that a ruling of merely a county public school inspector, under sec. 54(11) of the Public Schools Act, is finally binding upon all parties, on the question, which is also involved in this action: whether the provisions of sec. 44 of the Act have been so

complied with that the council of the township is bound to issue the debentures.

To say that a ruling, under that sub-section, involving in this case more than \$22,000, and which may in other cases involve hundreds of thousands of dollars possibly, is to oust the jurisdiction of the Courts and finally bind all parties concerned, placing a heavy burden of taxation upon many for years to come, and without a word in the sub-section providing that any ruling under it shall be final, or shall be subject to any appeal, seems to me to be self-evidently erroneous.

A stronger section contained in the Separate Schools Act, and one in which the appeal was to the Minister of Education and from him to the Lieutenant-Governor in Council, "whose award shall be final in all cases," in the case of *Arthur Roman Catholic Separate School Trustees v. Township of Arthur* (1891), 21 O.R. 60, was held to be inapplicable in a case such as this, to be applicable rather to the internal economy of the school.

Having regard to all the circumstances of the case, and to the provisions of sec. 53(7) of the Public Schools Act, the inclination of my mind would be to hold that the proceedings at the October meeting were valid; but, as some of my learned brothers take an opposite view of the question, and as it is not one that need be decided now, it is enough to say that the better course may be to get a new sanction of the ratepayers to the issue of the needed debentures.

The case may be finally disposed of now: granting an injunction to the plaintiffs, restraining the defendants from further action upon the contracts in question until the debentures are issued. If any further relief really be needed, the question of the form of the judgment may be mentioned at any time before the judgment is signed. It is not a case for costs—that is, as it has to be determined—because at present the only probable result seems to be a temporary halt at the instance of the very few against the wishes of the many.

MASTEN, J.:—The principal defendant is a rural school board, governed by the Public Schools Act, R.S.O. 1914, ch. 266. The question relates to the acquisition of a site for a new school building at a proposed cost of \$22,500. The choice of

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the proposed site appears to have been regularly approved pursuant to sec. 11 of the Act, and the matter in issue relates to the subsequent action in regard to the purchase of the lands.

The writ of summons is endorsed with a claim that the offers made by the defendants Badams, Harman, Cappellazzo, Bussato, Lamont, Vigor, Myers, Upfield, Nisbet, Wardrope, Blyth, Kirkman, Green, Waters, and Gynane, to sell to the defendants the school board certain lands in the endorsement mentioned, which offers purported to have been accepted by the defendants the Public School Board of Section No. 15 of the Township of York, in the County of York, and which offers and acceptances respectively bear date about the month of September, 1915, be set aside.

(2) To recover from the various defendants above named the moneys heretofore paid to them out of school funds on account of the respective purchases from each of them.

(3) Or, in the alternative, to recover the sum so paid from the defendants Wilcox, Hocking, and Hood, as having been improperly and illegally paid by them.

(4) For an injunction to restrain the defendants the Public School Board of School Section No. 15 of the Township of York, in the County of York, from making any further payments on account of the purchase-money of said respective agreements, or of applying for or prosecuting any application made to the Municipal Corporation of the Township of York, for the passing of a debenture by-law to raise the sum of \$22,500 for the purpose of purchasing the said lands hereinbefore mentioned and other lands for a school site.

On the 4th April, 1916, an *ex parte* injunction was granted by Mr. Justice Middleton, containing the following provisions:—

“This Court doth order that the defendants the Public School Board of School Section No. 15 of the Township of York, in the County of York, and John R. Wilcox and Thomas Hocking, two of the members of said school board, and each of them, be and they are hereby restrained until Wednesday the 12th day of April, 1916, or until the motion then to be made to continue this injunction shall have been heard and disposed of, from entering into any agreement with the other defendants for the purchase of any lands for a site for a public school, and from paying to any of the

other defendants any sum on account of purchase-money of the said lands, and from applying to or prosecuting any application to the Municipal Council of the Township of York for debentures for the sum of \$22,500, or for the passing of a debenture by-law to raise the sum of \$22,500, or any other sum, for the purpose of acquiring the lands mentioned in the writ of summons, or any of them, for a site for a public school within the limits of the said school section, or from receiving from the Municipal Council of the Township of York the proceeds of any issue of debentures for the purpose of acquiring the said site in the said school section, or from doing any other act toward acquiring, or raising money necessary to pay for, a site for a public school in the said section."

"3. And this Court doth further order that all the above named defendants except the public school board and John R. Wilcox and Thomas Hocking be and they are hereby restrained from completing any contract of purchase for the lands mentioned in the writ of summons herein with the said public school board, or from in any way assigning, hypothecating, pledging, or otherwise dealing with, any alleged contract of purchase made between the said public school board and the defendants and any of them."

On the same day a notice of motion was given to continue this injunction until the trial.

The motion having been argued before Mr. Justice Middleton, he gave judgment on the 1st day of May, dealing with certain phases of the question raised; and, finding conflicting decisions, or at least decisions which conflicted with his own view in another phase of the matter, he concludes his judgment as follows: "This is the only question which remains to be disposed of in this action, and I think that I should turn this motion into a motion for judgment, so that the question may now be finally disposed of; and, as I entertain the view above expressed with reference to the decided cases, it is my duty to enlarge the hearing of this motion before a Divisional Court, where these decisions may be reviewed."

In this way the motion comes before us.

As the new school was not to be paid for out of the rates for one year, but was to be paid for out of money to be raised upon

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debentures under the provisions of sec. 44 of the Act, it was necessary that the steps provided for in that section should be taken before the board could have the required means for the purchase of the site and erection of the school.

A condensed history of the preliminary proceedings is as follows. At a meeting of ratepayers holden on the 4th September, called for the purpose of approving of the school sites selected by the school board, it was "moved by Mr. Camp, seconded by Mr. Barrowes that the trustees be empowered to purchase the site selected by them," and this resolution was adopted. It is quite probable that the ratepayers meant no more by this than that they approved of the site selected, and probable, too, that no one present at the time knew definitely the provisions of the Act or precisely by what steps the matter of acquiring a site and utilising it by the erection of a school house—for it was all one inseparable scheme—would be effected. A further meeting of ratepayers was called for the 27th September, to obtain the authority provided for by sec. 44 to apply to the council for the money required for site and building. At this meeting, the ratepayers, by a vote of 41 for and 20 against the resolution, decided not to do anything for six months. Another meeting was immediately called for the 6th October, 1915, "to reconsider the motion passed at a special meeting held on the 27th September, 1915, declining to give the trustees of school section 15 power to issue debentures to the amount of \$87,500 to cover cost of site and school building." Up to this time the separate purchase of the school site had not been mooted. It was at this meeting that the separate votes were taken, when 54 voted to authorise the application for which the meeting was called and 60 to apply to the council for \$22,500 to pay for the site. I think that the proceedings were not only illegal but distinctly unfair as well. However it was brought about, it is beyond doubt that some, and possibly many, of those who voted were under the impression that all they had was a choice between the two proposals. Mr. Deacoff, the secretary-treasurer, upon examination was asked: "Was your understanding that any ratepayer could come up and vote on both papers, vote for each proposition or against both of them?" His answer was: "No; my understanding was that they must vote for one or the other—that is the way I understood it." It can hardly be thought that the ratepayers were in

a better position to grasp the situation than the secretary-treasurer.

The selection and acquisition of a site and the erection of a school house thereon are parts of one entire scheme. It would be folly to obtain a site if this were not to be promptly followed by building. The site alone costs \$22,500, and any long delay in building, after the site is paid for, would result in a very considerable loss.

The meeting of ratepayers held on the 6th October, 1915, was, according to the notice, for the purpose of authorising the school board to apply to the municipal council "for the issue of debentures to the extent of \$87,000." This sum was intended to provide funds to pay for the site and the estimated cost of building.

The meeting could lawfully deal only with the specific question for which it was convened—the declared purpose of the meeting. It was obviously called under sec. 44. There is no authority to the council to act upon the application until "the proposal for the loan has been submitted to and sanctioned at a special meeting of the ratepayers *called for the purpose*." A proposal for a loan of \$87,000 for erection of a school house, whether it did or did not include the site, is manifestly an essentially different thing from a proposal to provide money for the site alone; and I am of opinion that for this cause the vote taken, so far as the \$22,500 is concerned, was not a legitimate exercise of the powers conferred by sec. 44, and was and is irregular, unauthorised, and illegal. There is more than this: the defendants argued, and quite convincingly to my mind, that the proposal to borrow \$87,000 was in effect negatived—that is to say, the proposal to borrow which the ratepayers were summoned to sanction was not approved.

I refer to this to emphasise the fact that, beyond the selection of the site, no legal or effective step has been taken to provide the money required for the purchase of a site for the buildings. It goes beyond the objection that the debentures have not been issued; there is as yet no legal sanction for an application to the council.

Without discussing in further detail the proceedings at the October meeting of ratepayers, it appears to me that there are good grounds for believing that a substantial number of the ratepayers voted at that meeting under the mistaken belief that a legal and

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binding contract to buy the site had theretofore been entered into by the board of trustees, and that the only course open to the meeting was to vote for the resolution to raise the purchase-price by the issue and sale of \$22,500 of debentures, while the fact is that on that date there was no legal and binding contract to buy the site. On this ground, apart from anything else, I think the resolution passed at the October meeting of the ratepayers was not effective.

In the year 1893, it was plainly adjudged in the case of *Smith v. Fort William School Board*, 24 O.R. 366, that the trustees could not make a binding and unconditional contract to purchase or build until they were assured of the means to pay, through the issue of debentures

In that case Street, J., after quoting the provisions of the Public Schools Act then in force, says (p. 370): "An examination of these provisions shews that while the trustees of urban school boards may require the municipal council to levy and pay over to them the amounts needed for the ordinary expenses of the schools in their charge, their right to obtain money for the purpose of building a school house, or buying a school site, is not an absolute one, but is dependent upon their being able to obtain the consent of another body, which may be the municipal council, or may be the general body of public school supporters, according to circumstances. It is plain that, however urgent they may deem their need to be that a school house should be built, unless they can obtain the assent of the council or the electors to the scheme, they are absolutely without any power to obtain the necessary funds. I think the natural effect of such a limitation upon their powers, must be the same as if the Legislature had in direct terms enacted that no urban school board should enter into any contract to build a school house until they had obtained the passing of a by-law of the municipal council for the purpose of raising the money with which to build it. It cannot be assumed that the Legislature intended to allow them to contract a debt without any means of paying it. If allowed to contract the debt, and if they can manage to build the school house, the fact that it has been built, will almost compel the municipal council to pay for it, in many cases where they would have refused and the electors would have refused to authorise the expenditure in advance, and thus the plain object of the Legislature, of enabling the council or the electors to consider it upon its merits, would

be defeated. I think it highly necessary that none of the safeguards which the Legislature has thought fit to interpose between the zeal or the possible extravagance of the school board, and the public which is to find the money, should be disregarded."

I agree in these views; and, quite apart from that case and the general practice following it, I should now reach a like conclusion. That decision was made in respect to urban schools; but it appears to me that the same principle applies equally to the boards of rural school sections. The words of sec. 44 (1), empowering the board to requisition an issue of school debentures, end as follows: "Provided always that the proposal for the loan has been submitted to and sanctioned at a special meeting of the ratepayers called for the purpose."

If a school board could make a binding and unconditional contract for the purchase of land or the erection of buildings without regard to the safeguards which the law provides in the interests of the ratepayers, the very purpose of these safeguards could be easily defeated. The contract would be binding and could be enforced, though never sanctioned as the law requires.

For this reason, I am of opinion that the attempted purchase of the site by the trustees before the debentures to pay for it had been issued was invalid and nugatory.

For these reasons, I would propose that judgment should go restraining the defendants and each of them from taking any action in pursuance of the resolution complained of, or otherwise proceeding towards the proposed purchase, unless and until the proposal for the loan in question has been submitted to and sanctioned at a further special meeting of the ratepayers (which meeting should be promptly called), and until in pursuance thereof debentures have been duly issued.

As the ratepayers at the meeting to be held may regularly determine to issue the necessary debentures, the other questions raised in this action ought not now to be determined, and in regard to them the action should be dismissed, without prejudice to any action which may hereafter be taken with respect to such questions after such meeting of ratepayers has been regularly held.

Having regard to all the circumstances, there should be no costs.

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I should add that the views which I have expressed do not preclude the trustees from securing options on sites or from making contracts to buy conditional upon the lawful issue of the debentures necessary to provide the purchase-price.

I should add further that, in my view, the ruling of the inspector respecting the October meeting of ratepayers does not preclude the Court from granting relief in the form here proposed.

LENNOX, J.:—I agree in the result.

RIDDELL, J. (dissenting):—Public School Section No. 15 of the Township of York had been formed—or reformed—and the question arose as to the site of a school to be built for the section. In 1914, the trustees had obtained an option on some land north of Eglinton; but the annual meeting, on the 14th January, 1915, disapproved, and a resolution was then passed “that the trustees be instructed to secure options on new school sites in the future.”

The trustees took the matter up, consulted some of the ratepayers, and selected what they thought to be suitable sites: they instructed one of their number to secure options, and upon his report that he could not get the options without cash, they voted him \$100 to secure the required options. This he did, and the school board, on the 31st May, 1915, considered the options, decided on one site as the best, and resolved “that pending the acceptance by the ratepayers, we herewith hand the sum of one hundred dollars (\$100) to form the first payment on the purchase-price, and that we herewith offer to purchase the property for the sum of \$25,000.” The proposed vendors, the Colonial Realty and Securities Corporation, after consideration, determined to accept the amount; and, on the 14th June, the school board determined to call a school meeting “to sanction the purchase of a school site.”

On the 25th June, the meeting was held, the several proposed sites considered, that advised by the board amongst them, and it was decided to postpone the consideration of the matter pending the result of the arbitration going on concerning the division of the section—“sites in option be retained until such matters were settled.”

On the 10th July, instructions were given to obtain further options: the section was divided by township by-law, the county

council approved the award of arbitrators confirming the division, and a school meeting was duly called to consider the site. At this meeting, on the 4th September, it was decided (the ratepayers voting by show of hands) "that the trustees be empowered to purchase the site selected by them."

The trustees met on the 8th September, and decided to instruct their solicitors to carry out the purchase of the lots (they did not accept the Colonial corporation's lot). On the 10th September, the options, 17 in all, were accepted in writing, and some money, it is said, was paid by the board.

On the 18th September, it was decided to call a school meeting "for the purpose of considering the proposal of the board of trustees . . . to apply to the municipal council of the township . . . for the issue of debentures for such amounts as the ratepayers may deem adequate for the purpose of enabling the board to provide a school site and build a 12-roomed school on Harvey avenue."

On the 27th September, the meeting was held, and by a vote of 41 to 21 it was decided to "let the matter of issuing debentures stand over for six months."

On the request of a number of ratepayers, it was determined by the board to call a special meeting "to reconsider the motion passed at" this special meeting, "declining to give the trustees . . . the power to issue debentures to the amount of \$87,500 to cover cost of site and school building."

On the 6th October, the ratepayers met, the notice was read, and the solicitor for the board was asked to explain the position of affairs: he stated that the lands had been arranged for, and the money must be provided (or something to that effect), and the question came up whether the amount of money to be placed at the disposal of the trustees should be the \$87,500 they asked for, to pay for the land and build the school house, or only \$22,500, to pay for the land they had arranged for.

In addition to a motion, which was carried, that every one voting should sign his name either for or against the motion he was voting upon, there were two motions, on separate pieces of paper, one (which was carried) limiting the authority of the board to debentures to the amount of "\$22,500 for payment only on the land already contracted for by the board," the other "for the issue of

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debentures as aforesaid to the extent of \$87,500:" it is perfectly plain that all present supposed that in voting for the one they were voting against the other motion. Accordingly, while there was no formal putting of each motion to the vote "Yes" or "No," what was done was the equivalent. It is equally clear that it was understood that the land had been contracted for, and the money would have to be provided to pay for it.

On the 25th October, 1915, the solicitors were given \$250 to pay on the options, in addition to some \$1,791 already paid for the same purpose, which sums were paid to the vendors accordingly.

An appeal was taken to the public school inspector, under sec. 54 (11) of the Public Schools Act, R.S.O. 1914, ch. 266, by those dissatisfied with the purchase: that official decided that the proceedings at the school meeting were regular.

On the 31st March, 1916, the writ in this action was issued—the plaintiffs are a dissatisfied trustee and a dissatisfied ratepayer, the defendants are the school board, the other trustees, and the vendors. The claim is to set aside the offers to sell by and to recover the instalments paid to these vendors, to recover the money so paid from the offending trustees, to restrain them from paying any more, and to restrain them from applying for the passing of a debenture by-law by the Township of York.

The next proceedings are (to employ Mr. Justice Middleton's language) as follows:—

"The plaintiffs in this action seek to restrain the school board from proceeding with the purchase of a school site and the erection of a school building, upon various grounds, which, put shortly, resolve themselves into the contention that the proceedings at the meeting authorising an application to the council for funds were irregular and unfair, in that the questions were submitted in such form as to preclude any vote against borrowing; and, secondly, that the purchase of the land and the entering into of the contract before any by-law had been passed by the township was irregular and improper.

"Upon a motion for an interim injunction, Mr. Hellmuth, who then appeared as senior counsel for the defendants, objected that this Court had no jurisdiction, as the case was one falling within the provisions of sec. 20 (3) of the Public Schools

Act, R.S.O. 1914, ch. 266. Mr. Grant, for the plaintiffs, on that occasion, did not seriously resist Mr. Hellmuth's contention, and accordingly I dissolved the interim injunction; retaining the action, however, so as to be satisfied upon the question raised by Mr. Grant that it might be found necessary to have a judgment in the action vacating certain conveyances if he succeeded upon his contention before the County Court Judge in proceedings which he said he intended taking under the statute referred to.

"Upon these proceedings being instituted, there was a change in the personnel of counsel, and Mr. McPherson, who succeeded to Mr. Hellmuth's brief, contended successfully before the County Court Judge that the section in question had no application to the matters in controversy. Mr. Grant now renews his motion in this Court, and Mr. McPherson asks that the motion be dismissed; Mr. Grant at the same time seeking leave to appeal to the Supreme Court from the order of the County Court Judge."

My learned brother Middleton considered the County Court Judge right in his conclusion, turned the motion into a motion for judgment, and referred the case for decision to this Court, under sec. 32 of the Judicature Act, thinking as he did that the judgment in *Smith v. Fort William School Board*, 24 O.R. 366, was wrong, but considering that it was binding upon him and that it covered this case.

In *Smith v. Fort William School Board*, the school board applied to the town council for a by-law to be submitted to the people for debentures to the amount of \$12,000 for the purpose of building a new school house; the by-law was submitted, carried and passed. The board, instead of keeping within the limit, let a contract for \$18,860 for part of the new school house, and paid out of the \$12,000 some \$2,625 on account of the contract. It was expected that the whole building would cost \$21,216; and the trustees believed that the town would be compelled to supply the balance, over \$12,000. Mr. Justice Street held that the trustees had no power to enter into this contract, and enjoined them from proceeding with it: and he also ordered the repayment of the \$2,625 paid.

In *Forbes v. Grimsby Public School Board*, 6 O.L.R. 539, Boyd, C., at p. 541, says: "*Smith v. Fort William School Board* . . . decides that school trustees should not undertake to

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build in excess of funds provided by the council, and that is a salutary rule;" and he held that the board was not restricted to the money voted by the council under sec. 76 of the Public Schools Act of 1901, but might turn in the other moneys they had under control in the shape of rent and the proceeds of the old school house and site.

I venture to think that the real decision in *Smith v. Fort William School Board* has been misunderstood. The very learned Judge pointed out (24 O.R. at p. 371) that, "however urgent" the trustees "may deem their need to be that a school house should be built, unless they can obtain the assent of the council or the electors to the scheme, they are absolutely without any power to obtain the necessary funds. I think the natural effect of such a limitation upon their powers must be the same as if the Legislature had in direct terms enacted that no urban school board should enter into any contract to build a school house until they had obtained the passing of a by-law of the municipal council for the purpose of raising the money with which to build it."

What the learned Judge was considering will appear from an examination of the statute (1891) 54 Vict. ch. 55, especially sec. 116, substantially the same as the present R.S.O. 1914, ch. 266, sec. 43 (3).

It will be seen that when an urban school board applied for the issue of debentures for the erection of a new school house, etc., they did not obtain the assent of ratepayers in advance—they applied to the council, and, if the council approved the scheme, a by-law was at once passed. If the council did not approve the scheme, then the school board might have the question submitted to the ratepayers, and, if they approved, the council must pass a by-law accordingly: 54 Vict. ch. 55, sec. 116 (1).

What is meant by the language quoted is simply this: the school board is not the final judge of the propriety of any such scheme—if the council agrees with it, the scheme is approved and finally—if not, the people's consent must be obtained, and, if they approve, that is final—in any case final approval is shewn by the by-law passed by the council.

Reduced to its simplest form, it means that trustees are not to incur such liabilities without the approval of another body elected by the people to guard their interests, or that of the people themselves.

It may be put thus: trustees are not to act against the wishes of those for whom they are trustees (in the absence of special statutory or other authority).

In the *Smith* case, the council had agreed with the board that \$12,000 should be spent on the building—neither council nor ratepayers that \$18,000 or \$21,000 should or might: and it was a plain breach of trust to use \$18,000 or \$21,000 for that purpose.

In the *Forbes* case it was unsuccessfully contended that the school board was limited to the amount voted by the council—the Chancellor thought otherwise—he in effect held that any money which the board could, without breach of trust, apply in the building, might be so applied.

The case of a rural school board was and is different in particulars—the board, if it wants an issue of debentures for such a purpose as has been mentioned, calls a special school meeting to consider the matter, and, if that meeting sanctions the application, the council cannot refuse to pass the necessary by-law: 54 Vict. ch. 55, sec. 115 (1); R.S.O. 1914, ch. 266, sec. 44 (1). But the principles governing both cases are the same.

The language of Mr. Justice Street must not be taken too literally: it is not necessary that when the assent of the people has been obtained, and all that remains to be done is what must legally follow, i.e., the passing of the by-law, the actual passing of the by-law must be awaited before the board can act upon it—the question is, has the final authority passed upon the matter favourably?

The present case is widely different from the *Smith* case—the ratepayers (the final authority) had directed the school board to procure options, the board had done so, and had called the ratepayers to a special meeting to consider these options, the ratepayers had decided the matter and given express directions to carry out the purchases proposed. Instead of a breach of trust being imputable to the board in their accepting the options, it would have been a breach of trust for them to have acted otherwise: they were doing their simple duty, and I see no reason for considering that they had not the power to enter into these contracts. It would certainly be a monstrous result if we must hold that a school board had not the power to enter into contracts for land necessary for the erection of a school house which their

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ratepayers had expressly directed them to enter into. There is no authority binding us so to hold, and I decline so to hold in the absence of such authority.

If the ability of the board to pay for the school site is to be considered a test, it must not be forgotten that the board may, without any mandate or approval by a school meeting, require the council to raise the money by one yearly rate: sec. 45.

It is perhaps not necessary to say that the express duty is case upon the board by sec. 73 (e) of the Act; and that, when the choice of the board is ratified by a special meeting under the provisions of sec. 11, the board can, in my opinion, make a binding contract.

That being so, the statements of the solicitor at the meeting complained of were substantially correct—and I do not think that it is open to any one now to complain of the resolution to apply to the township council for \$22,500.

I would dismiss the action with costs.

I do not think myself called upon to express any opinion as to the finality of the decision of the inspector—the position of a public school inspector is one of great usefulness, his duties are arduous, most of those occupying that office are of the highest character, great diligence, and prudence, ripened by experience, and I would be loath to interfere with their judgment or discretion unless forced so to do by imperative law.

Judgment for the plaintiffs; RIDDELL, J., dissenting.

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June 9.

CADWELL & FLEMING v. CANADIAN PACIFIC R.W. Co.

Nuisance—Railway—Building Embankment in River—Absence of Authority of Board of Railway Commissioners—Changing Course of Water of River—Erosion of Shore—Washing away of Valuable Sand and Gravel—Continuing Nuisance—Damages—Assessment of Future Damages in Lieu of Mandatory Injunction—Judicature Act, R.S.O. 1897, ch. 51, sec. 58 (10).

The plaintiffs, the owners of a block of land on the north side of the Maitland river, at its mouth, complained that the defendants, in the building of a line of railway across the river, had constructed an embankment part of the way across the bed of the river, which narrowed the stream, and was so constructed as to throw the waters of the river with great force against the bank of the river on the plaintiffs' side, by the effect of which valuable

sand and gravel had been and was being and would continue to be washed away from the plaintiffs' lands, causing them injury; and they claimed damages and an injunction:—

Held, upon the evidence, that the embankment was built without the authority or sanction of the Board of Railway Commissioners.

(2) That, in erecting the embankment and thereby closing the south channel of the river, the defendants had created a continuing nuisance.

(3) That the effect of the embankment was to turn much larger quantities of water in times of high water and freshets to the north shore than had previously flowed there; and that the flow of water to the north, the deepening of the north channel, and the erosion of the shore, were all accelerated and increased by the building of the embankment.

(4) That one half of the loss suffered by the plaintiffs was caused by the embankment; and their damages from the date of their acquisition of the land to judgment were assessed at \$600.

(5) That, in lieu of a mandatory injunction to restore the south channel, damages should be awarded to the plaintiffs: Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 10; and future damages were assessed at \$3,500, subject to a reference, if desired.

Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287, specially referred to.

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ACTION for damages and an injunction in respect of injury to the plaintiffs' lands on the north side of the river Maitland, at its mouth, opposite the town of Goderich, by the acts of the defendants, the Canadian Pacific Railway Company and the Guelph and Goderich Railway Company.

May 10 and 11. The action was tried by CLUTE, J., without a jury, at Goderich.

J. H. Rodd, for the plaintiffs.

Angus MacMurchy, K.C., *C. Garrow*, and *J. D. Spence*, for the defendants.

June 9. CLUTE, J.:—The plaintiffs reside in the city of Windsor, and are engaged in the sale of sand and gravel used for buildings and pavements.

On the 15th September, 1915, the plaintiffs purchased block A, lying in and on the north side of the river Maitland, at its mouth, opposite the town of Goderich. On the northerly side of the river, upon the plaintiffs' lands, are high banks of sand and gravel extending about 1,200 feet along the river and covering an area of fifteen acres.

The plaintiffs complain that the defendants, in the building of the Guelph and Goderich line across the Maitland river, at a point immediately at the eastern line of the plaintiffs' property, through and across the river, constructed a broad, high embankment, two-thirds of the way across the bed of the river from the south-

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erly side, narrowing the stream to a fraction of its former size, and so constructed the embankment as to throw the waters of the Maitland river with great force against the bank of the river on the plaintiffs' lands; that, in consequence of such diversion, the waters of the Maitland river have been year by year washing out into Lake Huron large quantities of the sand and gravel from the plaintiffs' lands, to their serious loss and damage, which gravel is worth at least 10 cents per cubic yard as it lies; for which injury the plaintiffs claim damages and an injunction.

The defendants say that their embankment and bridge were constructed and maintained under their Acts of incorporation and the Railway Act, and deny that the said embankment has the effect complained of, or now operates to the detriment of the plaintiffs' property.

Exhibit 1 shews the plan of Goderich harbour as it was in 1859. This plan shews the main channel of the river to cross the bed of the river reaching to the southerly bank in the line marked "Maitland river." It will be seen that the mouth of the river is pretty well filled with islands, and that there is a projection of land marked "12 acres" down to the "mouth of the harbour." It will be further seen that there is a blind channel along the northerly bank protected by a projection of land on the east and by a large island and some smaller islands on the south, with no outlet into Lake Huron except to the south at the "mouth of harbour."

In an earlier plan, exhibit 4, made in 1844, a "breast-work" is shewn to the east of the lands in question, offering further protection to them, and clearly indicating the main channel of the river by the direction of the arrow to and down the south shore, thus affording a complete protection to the river bank of the lands in question, which at that time and to a much later period, of which I will speak further, were fully wooded down to the water's edge. All this is now changed, and on a view which I took at the request of the parties the appearance is wholly different from that indicated by these earlier plans.

The first important change was made in 1873-1876 by Government works for the improvement of Goderich harbour. A plan, exhibit 20, indicates the change. The full line shews the conditions as they are now, and the dotted line shews the conditions as indicated by exhibit 1. It will be seen that the Government breakwater entirely shuts off the river from the harbour, and a new

outlet was made further north—through the solid land, leaving what was the old channel and outlet of the river as entrance to the present harbour. This breakwater is raised some sixteen feet above the land level, and effectually prevents any water from the river passing out to the lake by the old channel. The question much controverted at the trial was as to the effect of the breakwater. The plaintiffs contend that the breakwater did not cause the channel of the river to change, but that the change occurred after and was caused by the building of the railway embankment. The defendants contend that the building of the breakwater has caused all the change in the river, and has thrown the channel from the south bank to the north bank along the plaintiffs' property, and that this change was complete before the railway embankment was built.

The plaintiffs' claim is that the damage to their property is caused at the time of high water and freshets, and that the conditions must be considered as they exist at such time.

The breakwater is about 2,000 feet in length, and the embankment about 1,000 feet from the south shore to the bridge proper. The embankment was commenced in the fall of 1904, and completed in 1906. It is from 50 to 60 feet wide at the base, and from 12 to 15 at the top, and about 20 feet high, and connects with the defendants' railway bridge. It completely cuts off the old channel on the south shore, which formerly ran between the mainland and island number 1 (see plan exhibit 20), across which the embankment is built. During the summer season comparatively little water passed down this channel, but in high water and spring freshets a very considerable quantity of water passed through, and there was sufficient depth for large numbers of saw-logs, which were held in boom above the point where the embankment crosses this channel, and which supply a saw-mill further up the stream. What was formerly the main channel is now almost filled up. Large portions of the islands which crowd the mouth of the river, during spring freshets and backwater caused by ice-jams, overflow with ice and water; so much so that during the last year blocks of ice and water were carried over the breakwater.

There can be no doubt, and I find, that the breakwater caused a great change in the flow of the water, throwing more to the north channel and tending to make that the main channel.

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During the construction of the embankment, a dam was made across the channel immediately to the west of the embankment, which was formerly the main channel. From seven to ten teams with as many men worked upon this dam for several weeks, digging the earth from the islands, and raising a dam some four or five feet above the water level. The effect of this dam, while it stood, was, of course, to prevent the water passing down the old main channel and to throw it to the present main channel over and along the plaintiffs' lands. The evidence shews that this dam did not long remain there. It was probably carried away by the first spring freshet after it was built. If so, this emphasises the fact that a quantity of water passed down the old channel in high water and freshets.

Three witnesses called by the plaintiffs gave strong evidence as to the condition of the river before, and its effect upon the north bank after, the embankment was built by the defendants.

Mr. Sallows is a photographer; he came to Goderich in 1876, and was very familiar with the conditions at the mouth of the river, and took photographs from time to time, long prior to this action. He shews by exhibit 6, taken in 1896 or 1897, the four channels, of which the most northerly against the bank, C, was a blind channel. He says the water going down the river did not enter that channel, it came in from the lake. There was a floating bridge one hundred feet across A; that is, the most southerly channel, which is now entirely closed by the embankment. He points out that in the spring freshets the water was from six to ten feet higher than in the summer, and Indian island would be submerged from six to ten feet. He swears that the north channel, D, was not the main channel, was not the more important channel, until after the building of the embankment. He has lived within a block or two of the river since he came to Goderich. Other views taken by him, exhibit 11 (1902), exhibit 8 (1913), exhibit 7 (1911) and (1916), throw much light on the question.

Dr. Taylor came to Goderich in 1876, and has always resided on the bank of the river, opposite the lands and above the embankment in question. He always considered that the main channel of the river was down by the breakwater until the embankment was made. Since the embankment, not as much goes down to the south.

Mr. Dancey, barrister, of Goderich, had a boat-house where the east end of the embankment now is, and was in the habit of using it two or three days a week for many years prior to the embankment being built. He says the water flowed on both sides of the island number 1 on which the embankment is. The channel to the west of the island was the main channel till the Canadian Pacific Railway Company built the embankment. The southerly channel, which is now entirely closed, was one hundred feet wide, and he was always able to pass up through this channel between the island and the south shore, with a boat. He lives on the bank of the river above the embankment. On cross-examination he said that there was no erosion to any extent till after the embankment was built; that there was some erosion after the breakwater was built; that the river never changed its course till after the embankment was built; and that there was no main channel to the north, to the lands in question, until after 1906. The greatest erosion has been since the building of the embankment.

The most important evidence as to the condition of the south channel, now fully closed by the embankment, is that of John C. Platt, who owns the land east of the embankment. He used the south channel, A, now closed, for booming logs. He says it was about 150 feet across; that he boomed his logs at this point, and he would have as many as 500,000 at one time; that the embankment blocked up this channel, and the water then went down the north channel. It jammed till it got very high, then went straight west to the lake. It broke along the bank; ice was packed on the breakwater side, and it broke on the north side. He says the north channel has been the main channel for some time, perhaps from 1901; that the main channel was to the breakwater and did not follow the bank; that more and more it has taken that course; as the old channel began to fill in, the water went more to the north.

For the defence upon this point a number of witnesses were called.

Robert Young was manager of the farm of which the bank in question forms part from 1890 to 1900. He says that after 1895 the river began to work its way to the blind channel and to cut away the Attrill bank, and this continued for a few years

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before the Canadian Pacific Railway was built; that in 1890 nearly all the water went into the old channel, but in ten years thereafter very little ran there, and that in 1906-7 it was running in the north channel. (Note: the embankment was commenced in 1904 and finished in the fall of 1906.)

E. R. Watson, Government grain weighmaster, says that since the breakwater was built the old channel began to fill and the north channel took more water.

John Oakley was coachman at Attrill's for twenty-one years, from 1893 to 1914. He refers to Young moving a portion of the fence back in 1906, owing to the erosion of the embankment. He says that it commenced in 1905; the hill was breaking away at the top. Freshets and ice were the cause of it. He says the bank was all right up to 1896 or 1897.

Mr. Ernest Heaton, barrister, who married a Miss Attrill, and lived at the Attrill house on the land in question, came to Goderich in 1888; and, after the death of Mr. Edward Attrill in 1907, was adviser to the trust company who acted as trustees of the estate. He says the bank was a source of great anxiety; the trees began to go down in 1896; he also says that in 1895 the main channel was on the north side, and there was quite a flow of water to the south of the island where the embankment is now; he says the bank receded at the rate of three feet a year from 1897 until they sold, and there was an increasing recession as the trees disappeared; that he could not give an opinion as to whether there was a greater erosion after the embankment was built. He says: "I did not observe any effect. I think it had not any effect, except perhaps on the water, diverting some water that would have gone in the old channel;" *that he never watched the freshets and cannot speak of their effect.*

Naughan M. Roberts, district engineer, when the railway was being built, for forty miles of the defendants' railway ending in Goderich, says the main channel was along the Attrill branch; that the middle of the island at number 1 was dry at times; and took the view that the embankment causes no obstruction.

Clement McLeod, Professor of Engineering in McGill University, Montreal, and for twenty-five years a consulting engineer, visited the locality in November, 1915, and again in March and in April last, and observed the action of the water at the spring

freshet on the 30th March, 1916. In his opinion, after the construction of the breakwater the water took the shortest course, and the river embankment had no effect whatever on the action of the ice or the flow of the stream. In his view, the erosion is not due to the embankment in the slightest degree.

Richard S. Lee, engineer, was of opinion that the Government breakwater accounted for all the changes that have taken place, by opening a new mouth and channel; the old channel filled up as the new channel opened; that the embankment has no influence whatever in the formation of channels below.

It will be seen that the plaintiffs' evidence tended to shew that the main channel continued to the south until after the embankment was built, and that the effect of the embankment was to throw the water more to the north and to make the main channel along the plaintiffs' lands. The witnesses for the defence were to the contrary, and especially the experts, who expressed the view that the main channel was caused by the building of the breakwater, which caused the erosion complained of, and that this damage was not increased to any extent whatever by the building of the embankment. I do not accept these extreme views of either class of witnesses.

The photographs throw much light upon the condition of matters prior to and after the embankment. The earliest one; exhibit 6, was taken in 1896 or 1897, and shews the four channels, A, B, D, and C, very clearly. The train there shewn is that of the Grand Trunk Railway along the shore. The photograph, having been taken from the south shore, shews channel A to be the largest, which was not the fact, B being the main channel. Channel A was entirely closed by the embankment. It also shews that some erosion had taken place along the bank, though for the greater part of the distance the upper part of the bank, except in one or two spots, does not appear to have been broken. In 1903, exhibit 8, more erosion has taken place. This photograph was evidently taken when the water was comparatively low, and it is difficult to see which is the main channel. It would appear that the main channel had not fully broken through to the north shore, but along portions of the bank erosion had clearly taken place.

It was suggested, not seriously argued, that, even although the embankment had caused the injuries complained of, the defend-

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ants were not liable, as what they had done was authorised by statute and by the Railway Board. Sections 151 to 156 of the Railway Act have reference to the general powers conferred. Section 151 (1) provides for the diversion of highways and waterways; sec. 154 directs that where watercourses are interfered with the company shall put the same in such a state as not materially to impair the usefulness thereof; and sec. 155 provides that the company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible and shall make full compensation to all persons interested for all damage sustained by them by reason of the exercise of such powers. In my opinion, the obstruction in this case amounts to a continuing nuisance, and the plaintiffs were peculiarly injured thereby, in a way different from that which affected the general public, by reason of the erosion and destruction of the gravel bank.

In the present case there was no occasion for blocking up the southerly channel; according to the plaintiffs' engineer, Mr. Newman, the damage caused by the obstruction could have been almost entirely prevented, and could even now be largely abated, by opening the south channel.

The order of the Board of Railway Commissioners, exhibit 21, dated the 6th June, 1905, with reference to the application of the defendants the Guelph and Goderich Railway Company, under sec. 203 of the Dominion Railway Act, 1903, to the Board for approval of the construction of *the substructures of certain bridges*, among them Maitland river, as shewn on the detailed plan on file with the Board, reads as follows: "It is ordered that the said detailed plans on file with the Board be and the same are hereby approved and sanctioned. A. C. Killam, Chief Commissioner." The plan attached to the order, exhibit 21, is that of the bridge proper, between the abutment piers, and has nothing whatever to do with the embankment. So far as the evidence shews, the embankment in the bed of the river was built entirely without authority or sanction of the Railway Board.

The south channel was navigable for small boats up to and beyond the embankment, and afforded a large outlet for the water in spring freshets, directing it, owing to island number 1, to the southern bank, and thereby, in my opinion, relieving to a large extent the water which would otherwise flow down the northern

channel at such times, even after that channel became the main channel of the river. In erecting this bank and thereby closing the south channel, the defendants, in my opinion, created a continuing nuisance to all who might be injured thereby.

From the evidence and a view of the location, I am satisfied, and find, that the effect of the embankment was to turn much larger quantities of water in high water and spring freshets to the north shore than had previously flowed there; and, while the break-water had greatly modified the form of the river, and was tending to create a channel to the north, and erosion had taken place, I entertain no doubt, and find, that the flow of water to the north and the deepening of the north channel and the erosion of the north shore were each and all accelerated and increased by the building of the embankment.

The greatest difficulty I have felt is in forming a judgment as to the extent of such increase and as to the proportion of injury from each cause. The lands now owned by the plaintiffs will continue to be injured by this erosion from both causes.

After a careful review of the evidence and the help received from a view, my opinion is that at least one half the loss suffered by the plaintiffs is due to the embankment. The plaintiffs have established to my satisfaction that the gravel bank in question is of first class quality, and that its fair market value is at least ten cents per cubic yard in place. Taking this as the basis for calculation, I assess the plaintiffs' damages from the date of their purchase to the date of judgment at \$600.

A more difficult question is raised as to whether or not, under all the circumstances of this case, a mandatory injunction restraining the defendants from continuing the close channel, or an assessment of future damages under Lord Cairns' Act, 21 & 22 Vict. ch. 27 (Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 10),* is the proper remedy. Prior to the Act, I entertain no doubt

*10. In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as it may deem just.

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that a mandatory injunction would have issued in a case like the present: *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H.L.C. 600. The rule as there laid down was thus stated by Lord Kingsdown (p. 612): "If a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, . . . unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

In *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, Lindley, L.J., after referring to the rule just quoted, deals with the effect of Lord Cairns' Act in such case, and observes (p. 315) that "in exercising the jurisdiction thus given attention ought to be paid to well settled principles," pointing out that "ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn the Court into a tribunal for legalising wrongful acts; or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of Justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation. Lord Cairns' Act was not passed in order to supersede legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act." In the same case A. L. Smith, L.J., in laying down the rule as to when damages may be given instead of an injunction, says (p. 322): "In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to

restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

"In my opinion, it may be stated as a good working rule that—

"(1) If the injury to the plaintiff's legal rights is small,

"(2) And is one which is capable of being estimated in money,

"(3) And is one which can be adequately compensated by a small money payment,

"(4) And the case is one in which it would be oppressive to the defendant to grant an injunction:—

"then damages in substitution for an injunction may be given."

The *Shelfer* case was one in which the trial Judge allowed damages for a continuing nuisance caused by noise and vibration from the erection of powerful machinery on adjoining lands. The Court of Appeal reversed this decision and granted to the plaintiffs an injunction.

See also *Ramsay v. Barnes* (1913), 5 O.W.N. 322; *Gage v. Barnes* (1914), 6 O.W.N. 232.

After consideration of all the circumstances of this case, I arrive at the conclusion, although with much doubt, that I should award damages instead of a mandatory injunction to restore the south channel. I do so from the following considerations: the owners of the land in question had full knowledge of what was being done in the erection of the embankment, and, so far as appears, made no protest; there has been laches in applying for the remedy now sought; the railway is a great public utility, and the restoration of the south channel might cause, temporarily at least, inconvenience to the public; the probable expense of restoration would be very much greater than the payment of damages; such damages are capable of being estimated in money and adequately compensated for; and it would to a certain extent be oppressive to the defendants to grant the injunction and compel them to restore old conditions.

During the trial attention was not directed to this point, and no expert evidence was given as to how far the recession of the bank by erosion would probably continue. After giving the best consideration to that question that I can from the data before me, I assess the future damages at \$3,500, with leave to

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either party, if dissatisfied, to have a reference to the Master at Goderich to assess the damages. A reasonable time should be given to enable the parties, if they so desire, to obtain expert opinion upon the question. For this purpose thirty days may be allowed for election.

The plaintiffs are entitled to judgment for \$600 for damages assessed to the date of judgment; and, in case either of the parties elect to have a reference, the plaintiffs are entitled to judgment for the further sum of \$3,500. In either case the plaintiffs are entitled to costs down to and including judgment. In case of a reference, further directions and costs reserved.

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[APPELLATE DIVISION.]

June 12.

GALBREATH v. CRICH.

Building Contract—Alterations in Building—Work not Finished because of Subsidence—Fault of Contractor—Absence of Intervention by Owner—New Work Done by Contractor—Liability of Owner—Work Done to Arrest Further Subsidence—Deduction of Sum for Damages.

Where the plaintiff contracted to excavate a cellar and build a retaining wall, and the contract in respect of the retaining wall became impossible of performance, both because of subsidence and the interference of the municipal building inspector, and substituted work was directed by the defendant, the owner:—

Held, that, as the retaining wall could have been built before the cellar was excavated, and any risk thus avoided, the plaintiff was responsible for the method actually adopted, it not having been shewn that the defendant actively intervened to direct or superintend.

And *held*, that, the direction to do the substituted work was, in the circumstances, sufficient to make the defendant liable for its cost, but not for the expense of arresting further subsidence.

Held, also, that the defendant was entitled for damages to a sum which should be deducted from the cost.

APPEAL by the defendant from the report of R. S. Neville, K.C., Official Referee, in an action to enforce a mechanic's lien, finding \$399.50 due to the plaintiff for work done under a contract.

The plaintiff, an excavator, by the contract undertook to do necessary excavating and to build a concrete retaining wall where necessary, put in two windows and a door, for \$175; this was to include all material necessary, also supporting through centre of cellar; and a concrete floor was to be put in for \$33.50. Payment was to be made "on completion of job."

When the excavation was substantially finished, the stone foundation wall, which was to be supported by the cement retaining wall, slipped, and let the building down; and the cement wall could not be completed as contemplated. The plaintiff called in one Fess, who jacked up the building, charging \$75 therefor. Afterwards, the municipal building inspector insisted on a change of plan, and the plaintiff built a solid cement cellar wall to support the building.

The Referee allowed the plaintiff the cost of the whole work, done partly under the contract and partly as necessitated by the subsidence, at \$324.50, plus the \$75 paid to Fess.

June 1. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. Cohen and W. C. MacKay, for the appellant, argued that he was not responsible for the method adopted for doing the work, as the evidence shewed that he did not control it. He was entitled to damages, as to the amount of which no evidence had been taken. They referred to *Thorn v. Mayor and Commonalty of London* (1876), 1 App. Cas. 120; *Brown v. Royal Insurance Society* (1859), 28 L.J.N.S. Q.B. 275; *Trenton School Trustees v. Bennett* (1859), 3 Dutcher (N.J.) 513, 518, 519; *Lord v. Wheeler* (1854), 1 Gray (Mass.) 282; *King v. Low* (1901), 3 O.L.R. 234; Halsbury's Laws of England, vol. 3, para. 365.

R. G. Agnew, for the plaintiff, respondent, referred to Halsbury's Laws of England, vol. 3, paras. 372, 348, 366; *Schwartz v. Saunders* (1867), 46 Ill. 18; 6 Cyc., p. 64, n. 8; p. 59, para. 3.

Cohen, in reply, referred to 3 Com. Dig. 93, cited in the *Bennett* case, *supra*; *Wilson v. Wallace* (1859), 21 Dunlop (Ct. Sess. Cas.) 507.

June 12. The judgment of the Court was delivered by HODGINS, J.A.:—Appeal from the report of R. S. Neville, K.C., Official Referee, dated the 26th April, 1916, finding in favour of the respondent for \$399.50, as due on a building contract.

The respondent is an excavator, and contracted with the appellant to perform certain work under an agreement expressed in these words:—

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"Toronto, Aug. 19, 1915.

"Mr. J. G. Crich, 55 Shanly St., Toronto.

"Dear Sir: We herein propose to do necessary excavating and build concrete retaining wall where necessary, put in two windows and a door, for the sum of \$175.

"The above includes all material necessary, also supporting althrough centre of cellar. The same to be paid on completion of job.

"P.S. We also agree to put in concrete floor for the sum of \$33.50.

"THOS. GALBREATH,

"JOHN G. CRICH."

When the excavation was substantially finished, the stone foundation wall, which was to be supported by the retaining wall of cement, slipped and let the building down. Hence the cement wall, which was to protect the clay upon which the old wall stood, could not be completed as contemplated.

The respondent called in one Fess, who jacked up the building, charging \$75 therefor. After that the city inspector insisted on a change of plan, and in the end the respondent built a solid cement cellar wall to support the building.

The learned Referee has allowed the cost of the whole work as now done, partly under the old contract and partly as necessitated by the subsidence, at \$324.50, and has also given the respondent the \$75 paid to Fess—in all, \$399.50. His reasons may be shortly summarised thus: that the respondent was not responsible for the safety of the building; that the new work was ordered by the appellant as well as the jacking up, which latter was necessary and had to be done.

The respondent undertook, as a man of some experience in excavating, work of which he estimated the cost. It is true, as the Referee states, that both he and the appellant were under the impression that the scheme adopted was adequate; but it can hardly be maintained that this belief of the appellant, and the fact that he was at home and doing work in connection with the proposed cellar, absolved the respondent from carrying out his contract, even if that necessitated extra precautions. The retaining wall could have been built before the cellar was excavated, thus avoiding any risk. The respondent must, I think, accept responsibility for the method actually adopted, unless it

be shewn that the appellant actively intervened to direct or superintend, and that is not established: *Duncan v. Blundell* (1820), 3 Stark. 6.

The respondent is thus left in this position. His work not having been finished, owing to the subsidence, he could not recover, even if this was caused by accident without negligence. He might have abandoned it, subject to the appellant's claim for damages; but, if he went on and did what was necessary to accomplish the designed end, though in a different way, he must either prove a new contract for an additional sum, or he is limited to his original contract price—if the new work is to be treated as a substituted performance of the old contract.

I think this case is one which permits giving effect to the argument referred to by Lord Hatherley in *Thorn v. Mayor and Commonalty of London*, 1 App. Cas. 120, 135, that "if any body directs you to do that which he has no right to direct you to do without remunerating you, he must be held to be under a contract to pay *quantum meruit*."

Sufficient was not proved to warrant a finding that there was an express contract to pay. But it must not be forgotten that the work as contemplated was probably improper from the beginning; and, when the city inspector intervened, its further performance was both legally and practically impossible. Hence both parties had to deal with a new situation which prevented the completion of the old contract and necessitated the doing of new and additional work. This has added to the value of the appellant's house, benefiting it by firm foundation walls and a larger cellar. Under the circumstances in evidence, the direction by the appellant to the respondent to go on and do the work, which I think is fairly proved, coupled, shortly after, with a mention of damages, are sufficient to sustain the claim of the respondent to the extent of the \$324.50 found by the Referee as the value of the whole work as now done.

But it does not follow that, when the dangerous situation arose, the appellant should pay for the work necessary to prevent further damage. I can see no reason for charging the appellant with the cost of arresting the further sinking of the building. The necessity for jacking up arose in consequence of the respondent's operations, and that process was necessary to prevent further damage.

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With regard to the damages: while it is quite true that the appellant was not allowed to go into his claim to the full extent, enough was disclosed to enable the Referee to form the opinion that it was much exaggerated. Under the circumstances, this Court cannot finally fix an amount without giving the appellant an opportunity to prove his damages, but it may venture the opinion that \$50 would be a sufficient assessment, subject to the right of either party to take a reference back, the costs of which will be determined by success in increasing or decreasing this amount.

The appeal should be allowed and the judgment set aside. The parties must elect within one week; and, if no election is made to take a reference, the \$50 will be allowed to the appellant and deducted from the \$324.50, and the judgment will be entered for \$274.50 with costs, as allowed by the Referee in his present report, but with no costs of appeal.

If the reference is desired, it will go back to the Referee as to damages alone, in which case judgment will be entered after his report for the \$324.50 and costs as allowed by the present report, less the amount found by him.

The costs of the reference will follow in accordance with the direction already given.

Appeal allowed.

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[APPELLATE DIVISION.]

WOOD v. WOOD.

Foreign Judgment—Action on—Decree for Divorce with Alimony—Claim for Arrears—Jurisdiction—Finality of Judgment—Penal Action—Effect of Remarriage of Husband.

A judgment of a Court of the State of New York dissolving the marriage of the plaintiff and defendant, and ordering the defendant to pay the plaintiff \$50 per month for the support and maintenance of herself and child, was held, to be a final judgment, at all events as to the amounts past due; and in an action thereon, in the Supreme Court of Ontario, the plaintiff recovered judgment for arrears of the payments ordered to be made.

Swaizie v. Swaizie (1899), 31 O.R. 324, and *Robertson v. Robertson* (1908), 16 O.L.R. 170, approved.

The objection that the judgment was one recovered in a penal action was not sustainable.

Huntington v. Attrill, [1893] A.C. 150, and *Raulin v. Fischer*, [1911] 2 K.B. 93, followed.

The remarriage of the husband does not render his obligation under the judgment invalid as contrary to the moral rules upheld by English law.

AN appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff in an action upon a foreign judgment.

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June 2. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

F. J. Hughes, for the appellant, referred to *Scott v. Attorney-General* (1886), 11 P.D. 128, 131; *Robertson v. Robertson* (1908), 16 O.L.R. 170; *Swaizie v. Swaizie* (1899), 31 O.R. 324; *Pemberton v. Hughes*, [1899] 1 Ch. 781.

A. Bicknell, for the plaintiff, the respondent, cited 2 Am. & Eng. Encyc. of Law, 2nd ed., p. 92, note 1; *Campbell v. Campbell* (1875), 37 Wis. 206, 213; *Hadden v. Hadden* (1898), 6 B.C.R. 340, 347; *Huntington v. Attrill*, [1893] A.C. 150.

June 12. The judgment of the Court was delivered by HODGINS, J.A.:—Appeal by the husband from the County Court of the County of York in an action on a foreign judgment pronounced by the Supreme Court, State of New York, Erie County, on the 16th January, 1912. This judgment dissolved the marriage between the appellant and respondent and forbade the appellant to marry again during the lifetime of the respondent. It gave the respondent the care and custody of the child born of the marriage, and ordered “that the defendant pay to the plaintiff the sum of \$50 per month for the support of herself and said child as provided in the order entered herein September 15th, 1911.” The latter order was made on consent and contained this provision: “It is hereby ordered that the plaintiff be and she is hereby allowed the sum of fifty dollars (\$50) per month, beginning September 15th, 1911, for the support and maintenance of this plaintiff and the child of the parties hereto, born May 16th, 1908, during each and every month hereafter, and that defendant pay to the plaintiff the sum of fifty dollars (\$50) per month in payments of twenty-five dollars on the first and fifteenth of each month hereafter, beginning September 15th, 1911, such payments being for the support and maintenance of this plaintiff and the said child allowed as aforesaid.”

The amount claimed, and for which judgment has been entered, is \$605, being about twelve months' arrears up to the

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15th January, 1916. The appellant married again, in Ontario, on the 11th November, 1915.

The appeal was substantially on two grounds: first, that the judgment was recovered in a penal action; and, second, that, having married again, to enforce the judgment would be to compel a man to support two wives, and that this was contrary to the moral rules upheld by English law. This last ground was the best definition I could get from counsel in explanation of the ground of appeal (d), "that the plaintiff has no cause of action in the Province of Ontario except upon a foreign judgment, which is against natural justice, and therefore invalid."

In *Robertson v. Robertson*, 16 O.L.R. 170, also a case of absolute divorce, a judgment for arrears of alimony past due upon a foreign judgment was held by the Chancellor to be enforceable here. His decision is founded upon the judgment of a Divisional Court in *Swaizie v. Swaizie*, 31 O.R. 324. In that case the jurisdiction of the foreign Court was contested, but here no such question is raised; and, if it were, the jurisdiction is established by the evidence given at the trial. An additional authority of some interest regarding the right to recover the damages given by a foreign judgment of divorce against the co-respondent is *Phillips v. Batho* (1913), 29 Times L.R. 600.

The want of finality attributed to the English decree for alimony (see *Robins v. Robins*, [1907] 2 K.B. 13) is not apparent in the foreign judgment sued upon here, although it is not expressed in the same ample way as in that proved in the *Swaizie* case; but it appears from the evidence at the trial that the New York Court can revise its adjudication upon the quantum allowed.

It may be that, if alimony had been ordered in an action in Ontario, the power reserved under sec. 34 of our Judicature Act, R.S.O. 1897, ch. 51, to deal with the permanence of the grant, might affect the finality of the judgment; but, even if so, no Ontario Court could interfere with the New York judgment except by refusing to enforce it, for which no reasons are suggested except those already mentioned. This view is in consonance with that expressed by Jeune, J., in *Moore v. Bull*, [1891] P. 279.

The requirements set out in the judgment of the House of Lords in *Nouvion v. Freeman* (1889), 15 App. Cas. 1, at p. 9, that

"it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt, of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties," appear to be met in this case, so far as the arrears are concerned; for the testimony given by Mr. Madden, a practising attorney in New York State for over sixteen years, does not in any way indicate, but rather the reverse, that the Court could revise the amount past due. It may be added that under the procedure in New York State the judgment now sued on is a final one, pronounced three months after the preliminary and interlocutory decree for dissolution had been made.

Permanent alimony is defined and the right to it described as "that legal proportion of the husband's estate which by sentence of the Ecclesiastical Court is allotted to the wife for her maintenance after sentence of divorce (i.e., *à mensâ et thoro*) by reason of the cruelty or adultery of the husband, as the permanent allowance to be paid by the husband to the wife during the period of their separation."

This definition is quoted with approval in *Leslie v. Leslie*, [1911] P. 203, by Sir Samuel Evans, President, and is practically identical with the explanation given by Mr. Madden of the meaning of the alimony granted by the final order of the Supreme Court of New York.

The objection that the judgment is one recovered in a penal action cannot be sustained: *Huntington v. Attrill*, [1893] A.C. 150; *Raulin v. Fischer*, [1911] 2 K.B. 93.

As to the other objection, it appears to leave out of consideration the fact that the judgment sued upon effectually terminated the bond of matrimony, as is evidenced by the marriage of the appellant, based upon the divorce thereby obtained. Hence the appellant is not, by satisfying this judgment, while married to his present wife, contributing to support two wives, but rather paying the legal penalty for those acts which, while enabling him to re-marry, entail a yearly reminder of his past delinquencies.

While the jurisdiction of the New York Court to grant permanent alimony following an absolute divorce was questioned at the trial, nothing was elicited to cause difficulty on that point in this case. But, as the jurisdiction here and in England appears to depend on statute law, which is not the case, apparently, in

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New York State, according to Mr. Madden, it is necessary to say that this decision is not to be taken as indicating that this Court has finally considered and adjudicated upon that point if it should be raised under circumstances which require its determination.

Appeal dismissed with costs.

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[MIDDLETON, J.]

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Evidence—Vendor and Purchaser—Agreement for Sale of Land—Delivery to Purchaser—Action by Purchaser against Executors of Deceased Vendor—Self-serving Entries Made by Deceased in Connection with Entry against Interest—Admissibility—Weight of Evidence—Specific Performance.

Entries made in books or documents by a deceased person may be evidence in an action by or against his personal representatives. The entry of a payment against the pecuniary or proprietary interest of the party making the entry has the effect of proving the truth of other statements contained in the same entry and connected with it, even if self-serving. The weight to be given to such evidence is for the jury or the Judge sitting without a jury.

A written agreement for the sale of lands, in the handwriting of the vendor and signed by him, was distinctly for the sale of the vendor's whole estate in the lands. This was delivered to the purchaser, and remained in his possession. After the lapse of about eight years, the agreement not having been carried out by conveyance, and the vendor having died, there was found among his papers another document of the same date, signed by him, and substantially a copy of the document delivered to the purchaser, with the addition, however, of a clause which purported to shew that the sale was of an undivided half interest in the lands. Entries in the land sales book of the vendor shewed a payment made by the purchaser on account of the price, but also purported to shew that the sale was of a half interest only:—

Held, in an action by the purchaser for specific performance of the agreement, the document in his possession being produced and relied upon, that the document and entries of the vendor were admissible in evidence; but, upon the weight of the whole evidence, the agreement was for the sale of the entire estate of the vendor in the lands; and judgment was given for the plaintiff.

ACTION by the plaintiff, as purchaser, to compel specific performance of an agreement of the 22nd May, 1903, for the sale to him of certain water lots in the city of Sault Ste. Marie.

June 6 and 7. The action was tried by MIDDLETON, J., without a jury, at Toronto.

R. McKay, K.C., for the plaintiff.

W. N. Tilley, K.C., for the defendants.

June 13. MIDDLETON, J.:—The plaintiff's claim is, as purchaser, for the specific performance of an agreement dated the 22nd May, 1903, for the sale to him of certain lands, namely, water lots, in the city of Sault Ste. Marie. The defendants are the executors of the late W. H. Plummer, the vendor; and the main contest between the parties is, whether the agreement was an agreement for the sale of the lands or an agreement for the sale of a half interest in the lands.

Questions of difficulty as to the admissibility of evidence have to be considered. I received all evidence tendered, subject to objection; and it is convenient, I think, to outline the facts disclosed in evidence before considering the objections to admissibility.

The lands in question are referred to in the agreement herein-after mentioned as five parcels. They all form part of water lots lying between the Government dock on the west and a coal dock on the east, covering in addition two small parcels within the shore line. These five parcels were acquired by Mr. Plummer under different titles. Some of the parcels were held by him for many years. The last lot to which he acquired title was known as the Farwell lot, being the central water lot. Title to this was got under an agreement of the 24th February, 1903, for the price of \$1,300, the purchaser paying in addition \$57 commission to a real estate agent who acted as intermediary. This agreement was afterwards followed by an appropriate conveyance.

For some years prior to 1903, Mr. Clergue had been the general manager of certain large undertakings at Sault Ste Marie. These concerns practically constituted the whole industrial life of that town. The works were situated some considerable distance up the river, west of the Government dock.

Mr. Plummer was a merchant in a large way of business, and largely interested in real estate. His interests chiefly centred in the neighbourhood of Queen and Pim streets.

Ferries operated by the Sault companies carried passengers across the river to the American side, and some negotiations took place looking to the construction of a new ferry dock upon the water lots in question, at the foot of Pim street. This would mean the abandonment of docks further up the river, and would bring a large amount of traffic to the immediate neighbourhood

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of Mr. Plummer's store and the real estate in which he was concerned.

A letter from Mr. Plummer to Mr. Clergue of the 12th February, 1903, is produced. Mr. Plummer suggests the purchase of the Farwell lot; its purchase would complete a valuable block of land and water containing four or five acres, giving a frontage of 320 feet east of the Government dock and 220 feet on Pim street; a large portion of this could be utilised for warehouses. He adds: "I think you can build docks at this point on piles at much less cost than cribwork. I know of no block of water frontage west of this land that possesses advantages so general in character for all practical purposes, except perhaps the land controlled by your company west of the International dock . . . the land is, as you are aware, just the place for winter crossing, as no drift ice can block the channel when once broken. In any case the property is a valuable asset, and would make money if only held for speculation . . . I will be very much obliged if you will instruct me in the matter."

Mr. Clergue supplements this letter by the statement that what was suggested was that the companies of which he was the chief manager should purchase and operate the ferries to this point, constructing an end-on ferry landing at the foot of Pim street. The land owned by Mr. Plummer between the Farwell lot and the Government dock was not regarded as sufficiently wide for this purpose.

The next letter is one which both parties agree bears date the 15th May, 1903, though the date is far from distinct. Mr. Plummer writes to Mr. Clergue: "Mr. Farwell, from whom I purchased by your instructions the ferry station land near Pim street, wants his money at the due date, 20th instant. The balance due him, \$1,350; will you please remit a cheque for this amount? Do you intend erecting buildings on the lands this season? Kindly let me hear from you on this subject."

Under the agreement with Farwell already referred to, although the price is stated at \$1,500, the true price was only \$1,300, plus the \$57 commission. The commission and \$300 had been paid, and the balance was payable \$500 on the 24th May and \$500 on the 24th August.

An interview followed, when undoubtedly some agreement was arrived at. According to the plaintiff, the agreement was evi-

denced by a written document, exhibit 2, which has ever since been in the plaintiff's custody. This document, it is admitted, is entirely in the handwriting of Mr. Plummer. It bears date the 22nd May, 1903, and by it Mr. Plummer agrees to convey to Mr. Clergue the lands in question in fee simple. Originally the price was inserted as \$3,000, receipt of which was acknowledged. A change is made, in the handwriting of Mr. Clergue, by which this is stricken out and the price is made \$1,000, receipt acknowledged, on account, the balance, \$2,000, by note "on" one year at six per cent. interest. The \$1,000 was paid, but the \$2,000 was not paid at the time stipulated nor till long after.

So far, the transaction is easily understood. The difficulty arises in connection with the matters disclosed by the defendants' evidence, the admissibility of which I have to consider.

After Mr. Plummer's death on the 13th October, 1911, his executors found among his papers another document bearing date the 22nd May, 1903, which, like exhibit 2, is signed by Plummer alone, and which, save the last clause, is substantially a copy of the document delivered to Clergue purporting to agree to convey the land in fee simple for \$3,000. This price stands unchanged and purports to be \$3,000, receipt of which is acknowledged. The important difference is in the added clause: "I further agree to assign the aforesaid one undivided half interest to you or your assigns whenever you demand same, or if you prefer to leave title in me I will give you a declaration of trust that I hold said half interest for you."

It will be noticed that there is no aforesaid "one undivided half interest" referred to in the agreement. It is dated at the foot as well as the head, "May 22nd, 1903." There is no subscribing witness to either document.

In Mr. Plummer's land sales book there is an account which is headed, in the handwriting of Mr. C. V. Plummer, "F. H. Clergue and W. H. P.," and there is a credit entry, May 22nd, for the \$1,000, also in Mr. C. V. Plummer's handwriting. There is then entered, also at the head of the account—and, I am satisfied from its appearance, later than the entries by Mr. C. V. Plummer—in Mr. W. H. Plummer's handwriting, the words: "Value, \$6,000, sold F. H. Clergue one half interest in the three water lots adjoining the east side of the dock known as the Govern-

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ment dock, containing about 320 feet front, takes in Kinderling property; terms \$1,000 cash, balance \$2,000 in one year with interest six per cent. per annum." On the debit side of the account there is entered, under the date May 22nd, also in Mr. W. H. Plummer's handwriting, "Sold F. H. C. one half interest in above lands for \$3,000."

Mr. C. V. Plummer had no knowledge of the transaction save that derived from his deceased brother. Both he and Mr. Lyon, Mr. W. H. Plummer's son-in-law, deposed to conversations with Mr. Plummer in which he told them, at or about the time of the sale, that he had sold Mr. Clergue a half interest for \$3,000.

As I have said, the \$2,000 was not paid at the time it fell due. Mr. Plummer remained in receipt of some rents derived from the property, and paid the taxes. About the time of the agreement in 1903, the whole Clergue industries became financially involved, and there was a feeling of great depression at the Soo. The works were reorganised under substantially a different management, although Mr. Clergue held the position of Chairman of the Executive Committee; but a very large portion of his time was occupied in other business, and he was from that time on only occasionally in the town. During his absence, his brother, Mr. B. J. Clergue, looked after his business for him, but knew nothing of this transaction. In this period of stagnation and depression, matters seemed to have drifted without anything being done until 1908, when, on the 29th August, Mr. Plummer wrote Mr. Clergue: "There is due me on account of the purchase by you of the half interest in the Pim street property, near the Government dock, \$2,000 and interest at six per cent. from May 22nd, 1902 (*sic*). Please advise me whether you intend carrying out the deal or whether I will consider the matter settled by the forfeit of the \$1,000 that you have paid." Mr. Clergue was then in Europe, and his brother received the letter, and replied, acknowledging receipt, stating that he was not conversant with the details of the transaction, but that he would at once write his brother on the subject; adding: "I do not presume that he wishes to forfeit the \$1,000 already paid, as you suggest."

Mr. B. J. Clergue did not, as promised, write his brother, no doubt expecting to see him. Probably he did see him about Christmas time, but appears not to have discussed this matter with him.

In Mr. Plummer's record there is a copy of a letter to Mr. Clergue, dated the 9th January, 1909, but neither Mr. B. J. nor Mr. F. H. Clergue recalls receiving it. It simply asks for a reply. Nothing further was done until 1911.

In 1908 the depression still existed. The clouds began to lift in 1909 and 1910, and in 1911 property again had substantial value, and Mr. Clergue desired to complete the purchase. He was apprehensive that Mr. Plummer might not be ready to carry out the agreement owing to the lapse of time; and I would be inclined to think that, although he may have known of some correspondence having taken place in 1908, he did not realise that Mr. Plummer had in that correspondence stated that the purchase was of the half interest only. In the shifting of his office, the correspondence had been placed in packing cases in Montreal, while the agreement itself was, with title papers etc., in a safety deposit vault in New York.

The correspondence between Mr. Clergue and his solicitor has been produced, and is of importance as shewing the development of the situation.

On the 16th August, 1911, Mr. Clergue wrote Mr. Rowland, his solicitor, from New York, enclosing, as he says, the papers. The only paper enclosed, however, was a copy of the agreement held by Mr. Clergue, of the 22nd May, 1903. Mr. Clergue says: "I suppose that this is now very much increased in value, and that possibly Mr. Plummer may object to making the conveyance as originally proposed." In this letter there is no suggestion of anything but an out-and-out purchase.

Mr. Rowland saw Mr. Plummer, who was then in rather poor health, and asked him for a statement of the balance due. On the 11th September, Mr. Rowland reported this to Mr. Clergue, stating then that Mr. Plummer had since his request for a statement been very ill and had been taken away from the Soo by his daughter. On the same day, the 11th September, Mr. Rowland wrote Mr. C. V. Plummer a letter which contains the first indication on the side of the purchaser of there being any joint interests in the property. This letter says: "You will recollect that Mr. F. H. Clergue and your brother were some years ago jointly interested in a water lot adjoining the Government dock which Mr. Clergue was purchasing from your brother."

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He then states that he had asked and been promised a statement of the position in regard to the purchase-price, and requests Mr. C. V. Plummer in his brother's absence to take the matter up and get it adjusted.

Mr. Rowland had no knowledge of the matter save such as he derived from Mr. Clergue's letter of the 16th August, the agreement enclosed, and the interview he had had with Mr. Plummer; and his letter, although speaking of a joint interest, also speaks of Mr. Clergue as the purchaser of the land.

On the 10th November, W. H. Plummer being then dead, Mr. Rowland reported that he had no statement from either Plummer or his estate, and again wrote Mr. C. V. Plummer for the statement.

On the 2nd March, 1912, a statement was sent, shewing rentals received, taxes paid, a division of profit, and an agreement account shewing the \$2,000 balance, interest thereon, and a credit of these half profits. On that day Mr. Rowland wrote Mr. B. J. Clergue enclosing the statement, saying that he did not understand the division of the profits—his impression being that Mr. F. H. Clergue was not buying a half interest, and that possibly the rental came from other property covered by one lease, and suggesting the completion of the purchase, as property was increasing in value.

In August, Mr. Rowland wrote again to Mr. B. J. Clergue, suggesting the closing up of the matter, as it was possible the Government might desire to purchase. He adds: "There is no question that the lot is worth much more than when your brother bought his interest in it." Mr. Rowland explains that at this time he was still in ignorance of the real situation.

In January, Mr. Boyce, presumably acting for the Government, saw Mr. Clergue with reference to the purchase of the land. Clergue wired to Rowland that he had referred Boyce to the latter: to get his (Boyce's) best offer, and wire, with his advice. Mr. Rowland, then assuming that the Plummer estate had some interest, wired Mr. Clergue: "Plummer estate declines to put price; will see Boyce and advise you later." On the same day, he wrote reporting that he had seen Mr. Plummer and that the Plummer estate was not inclined to put any price on the water lot at all, and that, if Mr. Boyce was acting for the Government,

Mr. Plummer, on account of his political relationship, might get a better figure than if Mr. Clergue acted independently of him.

Mr. B. J. Clergue, acting for his brother, on the 6th January wrote to Mr. Rowland that he did not see why Mr. Plummer should take up the question of the sale with Mr. Boyce, if his idea of the transaction was correct; and apparently he also wrote a second letter on the same day, stating that he could not understand what the Plummer estate had to do with naming a price, provided the amount due the estate was paid. He then refers to the agreement of the 22nd May, 1903, as being the basis of the transaction between his brother and Mr. Plummer.

In the meantime, Mr. Rowland had written a further letter of the 7th January, evidently before receiving Mr. B. J. Clergue's letter of the 6th. On the 9th, Mr. Rowland wrote a letter explaining that his error arose from his recollection of the statement submitted by the Plummer estate, which had confused him.

The letter of the 7th, which had been written under the same impression, reached Mr. B. J. Clergue on the 10th, and produced a protest that Mr. Rowland was under some misapprehension as to the nature of the bargain.

Nothing came of the proposed sale; and, upon an attempt being made to close the transaction as between Clergue and the Plummer estate, the representatives of the Plummer estate insisted that the contract was, in accordance with their view, for the sale of the half interest only; Mr. Rowland insisted upon the opposite view; and in the result an amount was paid over which would correspond with the amount to be paid upon the contention of the Plummer estate, and somewhat greater than the amount which would be payable upon the theory of Mr. Clergue. The arrangement of the time of payment was embodied in contemporaneous letters; and, although there is some difference between counsel as to the meaning of these letters, I interpret them as meaning that the money was paid and received as being the price of whatever was in truth sold. If a half interest only was sold, that alone would be conveyed; if the whole interest was sold, then that would be conveyed; the question of the interest to be conveyed to Mr. Clergue being, by mutual agreement, left in abeyance until the return to the Soo of Mr. Rowland, who had left the town owing to ill health.

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In the view that I take of the matter, the only question left open between the parties was the one indicated.

I am entirely satisfied that, throughout, Mr. Rowland's evidence is to be accepted, and I am unable to draw any inference from the expressions used by him in his correspondence. The question in issue must be determined upon the documents and such evidence as is admissible to shew that the document signed by Plummer and delivered to Clergue did not shew the true transaction between them.

If the evidence, the admissibility of which I have referred to as being questionable, cannot be received, then there is no doubt that, upon the strength of exhibit 2, Mr. Clergue is entitled to a conveyance of the entire interests of the Plummer estate in the lands in question.

The legal question I find surrounded with much difficulty. *Higham v. Ridgway* (1808), 10 East 109, is the foundation of the doctrine which is in question. The history of that doctrine, and of successive attempts to modify it, is set forth in the notes to that case in 2 Smith's Leading Cases, 11th ed., p. 327.

What is decided in *Higham v. Ridgway* is much less than that which is found in the rule as frequently stated. The head-note of that case states the matter thus: "If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death."

The rule thus laid down was almost immediately followed by placing upon the same footing any declaration or entry against proprietary interests: see *Regina v. Overseers of Birmingham* (1861), 1 B. & S. 763.

In the great majority of cases, the question discussed has been the effect of an entry of a receipt of money made by the recipient. At the time the entry was made, it was, no doubt, against the interest of the recipient; and it was therefore unlikely that he would record the receipt of money which would either discharge an existing debt due to him or create a liability to account on his part, unless the money was actually received. At the time of the entry, its sole effect would therefore be against the interests of the person making the entry. At the time of the trial, the effect of the entry might be favourable to the case of the party

making it—e.g., it might have the effect of taking a debt, otherwise statute-barred, out of the statute. Nevertheless, had it been originally against interest, it was admitted.

But it was also held that the entry must be admitted in its entirety; and therefore, where a part of the entry was against the interests of the person making it, and another part of the entry was not against but in favour of his interest, in this way self-serving entries became admissible; and, as I understand the cases, this has never been departed from, it being a matter in each case for judicial discrimination as to the weight to be attached to the evidence.

Originally the rule was established with regard to the entries of persons not parties to the litigation; but it seems to have imperceptibly been extended so as to make available entries made by a person as evidence in favour of those representing his estate. The principle, thus understood, is sound; for, as pointed out by Hayes, J., in *The Queen v. Exeter Guardians* (1869), L.R. 4 Q.B. 341, 345, "having regard to the great changes that have, in recent times, been made in admitting the evidence of interested witnesses, when alive, it would be most objectionable to lay down any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer, and where the Courts are frequently obliged to supply the want of evidence by presumptions."

In *Davies v. Humphreys* (1840), 6 M. & W. 153, an entry had been made shewing the receipt of money as interest on a loan. It was sought to use this entry for the purpose of establishing the loan. The objection was taken that, so regarded, the entry was not adverse to the interests of the maker, and that it should therefore not be admitted. Parke, B., received the evidence, holding (p. 66) that "the authorities have gone beyond that limit" (i.e., the limit suggested), "and the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry and connected with it. . . . Without overruling these cases (and we do not feel ourselves authorised to do so), we could not hold the memorandum in question not to be admissible

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evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that £280 was paid . . . but also of the fact that the debt was due. . . . The effect of the evidence was for the jury."

To the same effect is the decision in *Taylor v. Witham* (1876), 3 Ch. D. 605. There an entry was made stating the loan, followed by entries of payments. The executors of the creditor tendered this as an entry against his interest. It was admitted because the payments shewn were against the testator's interest, and the whole entry was received as being evidence of the truth of all the statements contained in it; Sir George Jessel, M.R., remarking (pp. 607, 608) that it then became "a question of value. The entry may be utterly worthless when you get it, if you shew any reason to believe that he had a motive for making it; and that, though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony."

Some cases seem to state a different principle, namely, that where part of the statement is for and part of the statement is against the interest of the person making it, the statement should be regarded as a whole and cannot be said to be against the interest of the party. For example, in *Doe dem. Rowlandson v. Wainwright* (1838), 8 A. & E. 691, a document was signed in which a fact was admitted by the signer in derogation of her title, but by the same document she secured a benefit by forbearance and advance of money. Lord Denman, in delivering the judgment of the Court, refused to admit the document in evidence, saying (p. 701) that there was "a balance of interests. The latter may have been more than an equivalent advantage to what was lost by the former; but whether it were or not we cannot inquire: if there were an interest both ways, she stood legally indifferent, and the ground on which the evidence was tendered fails."

The same principle was applied in *The Queen v. Inhabitants of Worth* (1843), 4 Q.B. 132. An entry was made purporting to shew the terms of a contract. It was rejected, because it was uncertain whether the entry was for or against the interest of the party making it. All would depend upon whether the contract was one which it was to his interest to perform or one which it was his interest to evade.

In *Massey v. Allen* (1879), 13 Ch. D. 558, an entry of the purchase of shares was rejected by Hall, V.-C., because it might, according to the turn of the market, have been to the advantage of the deceased.

In *Crease v. Barrett* (1835), 1 C.M. & R. 919, a declaration by the occupant of land, fixing what was said to be the true boundary, was rejected because it could not be said to be against his interest, that depending on where the true boundary was. He might be either abandoning or seeking to shift the boundary of his neighbour. "This is a case in which a person merely declares that he is entitled as far as a certain point, but no further; and this declaration, taken altogether, can hardly be said to be against his interest, for, whilst he disclaims his right to one part, he affirms it as to another:" *per* Parke, B., delivering the judgment of the Court, at p. 931.

Smith v. Blakey (1867), L.R. 2 Q.B. 326, is of importance because there Blackburn, J., places the rule upon a surer foundation than the more lax statements found in some other cases. He says (pp. 331, 332): "When entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them, as evidence against third persons, not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement;" and where in that case the statement was one which was not "against pecuniary interest or, what is much the same thing, against proprietary interest, as where a deceased occupier of land admitted that he held as tenant of another, thus cutting down the *primâ facie* title in fee," but one which was to the person making it a matter of indifference, the statement was not received. This was adopted by Hall, V.-C., in *Massey v. Allen*, *supra*.

An entry of payment of interest made by the creditor at a period when the debt was already statute-barred was held by North, J., in *Newbould v. Smith* (1885), 29 Ch. D. 882, not to be admissible, as, though as an acknowledgment of the receipt of so much money it was against the interest, yet regarded as taking a debt out of the operation of the statute, which had then already run, it was clearly in the interest of its author. There again

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Lord Blackburn's statement of the rule was adopted. This case was appealed, but upon the appeal the case turned upon other grounds, and no light is thrown upon the question in hand.

Having regard to the circumstances of the case I am dealing with, I am strongly tempted to take the view that—although this entry undoubtedly does contain one matter which was against the pecuniary interest of the late Mr. Plummer, namely, the acknowledgment of receipt of the \$1,000, and another which may be said to be against his proprietary interest, namely, an acknowledgment that he had made some contract of sale—on the whole, and having regard to the other facts, the entry ought to be regarded as one which was entirely self-serving. When it is borne in mind that he had then delivered a contract purporting to sell his entire interest in the land, and when the fact that he had received the \$1,000 on account would readily be demonstrated, not merely by the receipt on the face of the contract, but by the production of the cheque, any contemporaneous writing by which the effect of the contract is cut down to being a sale of a half interest, from a sale of the whole, can hardly be supposed to be in any real sense adverse to his interest. But I think I am concluded by the cases referred to by Baron Parke; and, although the later cases indicate the development of a principle upon which the evidence ought to be excluded, it must be treated rather as a question of the weight to be given to it.

I do not see how the statements and entries made by Mr. Plummer can have greater effect in his favour than an oral statement made by him under oath if he were alive and in the witness-box. The case would then stand thus: a written contract prepared in his own handwriting, clear and unambiguous in its terms; the statement of Mr. Clergue, substantially unshaken, that this was the true bargain; the statement of Mr. Plummer that the bargain was entirely other than that evidenced by the document he drew and delivered. Add to this the fact that Mr. Plummer's letters written immediately before the making of the contract looked to an absolute sale and an absolute sale alone, and the fact that it would be inconceivable that the companies controlled by Mr. Clergue would build a ferry dock on property of which they did not own the fee, and Mr. Plummer's statement made to the witness Fawcett that he was selling the entire plot

for \$3,000, and that this was a good price at the time: the case would seem to be hopeless.

The case is not at all like some of those giving rise to the rule, where there was really no evidence, and the Court would be left to presumption if the evidence of the interest by the deceased person were rejected. Here there is a very heavy onus upon the defendants to get away from the undoubtedly genuine document produced, and I cannot see my way clear to thinking that this has been in any adequate way met by the statements made by Mr. Plummer.

How the document, exhibit 28, came into existence, why the entries made were made, why the statements were made to Mr. C. V. Plummer and Mr. Lyon, I cannot explain. To hold for the defendants I should have to find some explanation for the existence of the document delivered to Mr. Clergue, and also to find him guilty of perjury. Manifestly, on this evidence, I can make no such finding.

One minor matter I have not mentioned: the conveyance from Farwell to Plummer covered three parcels, two of which are covered by the agreement with Clergue—the third, a small parcel, containing thirteen-hundredths of an acre, immediately south of the parcel covered by the agreement. One might suspect that it was intended to be included in the property sold; but it was not so included; and the plaintiff is therefore not entitled to have it.

Judgment will go for specific performance, which will practically mean that a vesting order should be made, vesting the estate of the late Mr. Plummer in Mr. Clergue so far as the five parcels of land covered by the agreement are concerned. If for any reason a conveyance is desired, then the execution of the proper conveyance may be directed.

I do not think I should interfere with the payment made. As I have said, it is somewhat in excess of the balance due to Mr. Plummer's estate, but, as I understand the correspondence, this matter was not left open.

Costs will follow the result.

If this case is carried further, I think it is proper to state that I give most complete credit to the evidence of Mr. C. V. Plummer and Mr. Lyon, as well as to that of Mr. Rowland and Mr.

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Brown; nor do I see any reason for discrediting in any way the evidence of Mr. Clergue and his brother. In the financial embarrassment and confusion that resulted from the failure of the two enterprises, and Mr. Clergue's interest in other undertakings, I can well understand how impossible it is for him to remember accurately many minor matters, and how likely it was that much confusion should result in his own personal affairs.

[An appeal to a Divisional Court from the above decision was allowed on the 20th October, 1916. The reasons for the judgment of the Court will be reported in due course.]

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[APPELLATE DIVISION.]

June 15.

RE O'NEIL AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Compensation and Damages—Claims by Owner, Lessee, and Sublessee—Value of Land—Damages for Severance—Incidental Damages—Changes in Proposed Building—Delay—Award—Appeal.

Land at the corner of two streets in a city was leased by the owner upon a building lease for 21 years from the 1st May, 1911. In 1913, the buildings having been pulled down, the lessee proposed to build a theatre upon the land and to sublet the property for the remainder of the term (except one day) to a firm who were to operate the theatre; but on the 21st April, 1913, the city council passed a by-law to expropriate a part of the land—a quadrant of 20 foot radius from the corner. This necessitated a change in the plans of the building and an increase in the cost of it. The sublessees, however, accepted a demise of the premises subject to the by-law, at the same rental as had been stipulated for before, and their lessor was to go on with the building; he transferred to them all his claims against the city corporation for damages and compensation, except his claim for increased cost of the proposed building; and an award was made by which the corporation were ordered to pay to the owner, the lessee, and the sublessees, each a sum as compensation and damages for their respective losses by reason of the expropriation:—

Held, on appeal from the award, that the elements of damages and compensation were: (1) the value of the land taken; (2) damages for severance, if any, (sec. 325(4) of the Municipal Act, R.S.O. 1914, ch. 192); and (3) other damages.

There being no evidence that the remainder of the land was rendered less valuable by the severance, nothing should be allowed under that head.

The sums to be allowed to the claimants respectively and the proper method of fixing them was pointed out, and the award varied in some respects.

The sum of \$1,000 allowed to the lessee, as part of his incidental damages, for the delay in building caused by his operations was reduced to \$100 (MASTEN, J., dissenting).

AN appeal by the Corporation of the City of Toronto from an award of the Official Arbitrator for the city.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

Mrs. Gibson, the owner of the lot at the north-east corner of Gerrard and Parliament streets, let it to O'Neil for 21 years from the 1st May, 1911, at a rental of \$1,000 per annum for the first 15 years and \$1,200 thereafter, payable by monthly instalments in advance; the lessee to expend at least \$2,500 in improvements, keep in repair, etc.

O'Neil proposed to build a moving picture theatre, and to let the property for the remainder of the term (except one day) to Wagner & Hallat, who intended to run the theatre.

On the 4th February, 1913, O'Neil's agents reduced the terms of the proposed lease to writing; Wagner & Hallat to pay \$400 a month from and after the 1st May, 1913, or such time as the theatre should be ready.

The former building was pulled down, and preparations made to build, when, on the 21st April, 1913, the city council passed a by-law to expropriate a quadrant of 20 foot radius from the corner. This made it impossible to build a theatre of quite the same dimensions; but O'Neil and Wagner & Hallat entered into a formal lease for the remainder of the term (except one day), the lessees to pay \$400 rent per month in advance, repair, etc., from the 1st May, 1913, the lessor to build with due diligence a theatre as near like that as formerly proposed as the altered and diminished property would allow, and also a billiard-room.

The lessor transferred to the lessees all his claim for damages and compensation against the city corporation, except his claim for "increased cost of the proposed building caused by the rounding of the corner," the lessees accepting "the demise of the said premises subject to the by-law passed for such expropriation, but to be subrogated in respect thereto to such rights (excepting as aforesaid) as the lessor has or may or can have or claim."

In February, 1914, a notice to arbitrate was served on O'Neil, and the matter came before the Official Arbitrator, Mr. Drayton, who, on the 4th March, 1916, made his award, awarding Mrs. Gibson \$665.16, O'Neil \$1,900, Wagner & Hallat \$4,130: in all, \$6,695.16, with interest on the first and on part of the third sum from the date of the by-law.

The appeal was from this award.

May 23. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

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Irving S. Fairty, for the appellants, argued that the damages awarded the various claimants were excessive, and also contended that there had been fraudulent representations made to the arbitrator about the lease from O'Neil to Wagner & Hallat and his assignment to them of his claims for compensation against the city corporation.

A. C. McMaster, for the respondent O'Neil, and *S. W. McKeown*, for the respondents Wagner & Hallat, contended that these respondents should have been allowed for prospective profits, citing *Ripley v. Great Northern R.W. Co.* (1875), L.R. 10 Ch. 435; *Re McCauley and City of Toronto* (1889), 18 O.R. 416; *Hammersmith and City R.W. Co. v. Brand* (1869), 38 L.J.Q.B. 265, L.R. 4 H.L. 171.

Strachan Johnston, K.C., for Grace N. Gibson.

Fairty, in reply.

June 15. RIDDELL, J. (after stating the facts as above):—It is obvious that the elements of damages and compensation are: (1) the value of the land taken; (2) damages for severance, if any (sec. 325 (4) of the Municipal Act, R.S.O. 1914, ch. 192); and (3) other damages.

The arbitrator has allowed the value of the land taken at \$1,700, and I see no reason to quarrel with this estimate, and indeed it is not seriously complained of.

Mrs. Gibson, until the termination of the lease, will receive the same rental, so that during the currency of the lease she does not immediately suffer. At the end of the term she receives back her land (less \$1,700 worth) and a building less by some square feet than that she should have had but for the expropriation proceedings. There is no evidence to shew how much less valuable the building she will receive will be than that which she expected; but it is reasonably manifest that the building to be put up will cost about \$12,000. The amount of land actually taken by the city is only 86 sq. ft., i.e., $(20^2 =) 400$ less $400 \times \frac{3.14159}{4}$

and the whole area of the lot is about 2,320 square feet; so that, if the value of the building is proportionate to the amount of space covered, the actual building would be worth some \$450 less than that expected. It might indeed cost more, but it would not be so valuable. In the absence of any evidence to the contrary,

I think we may take the prospective loss to Mrs. Gibson at \$1,700 plus \$450 = \$2,150.

The loss at the 1st May, 1913, was the present worth of \$2,150 at that date; taking money at 5 per cent., that will be \$850.83, of which \$672.74 is attributable to the land alone.

For severance there can be no claim by Mrs. Gibson; there is no evidence that the remainder of the land is rendered at all less valuable by the severance; and she has no incidental damages. The result is that she is entitled to \$850.83.

O'Neil, had he not assigned his claim to Wagner & Hallat, would have been entitled to the remainder of the value of the land, *i.e.*, \$1,700 less \$672.74 = \$1,027.26; that sum, however, goes now to Wagner & Hallat.

For severance he cannot claim; he receives as much rent for the smaller property as for the whole.

His incidental damages are serious and some of them fixed by agreement on the part of the city.

The item \$1,900 allowed to O'Neil, expense occasioned by rounding the corner, is too high. Under this heading O'Neil's claim is set out in a revised statement furnished by Mr. Thompson (exhibit 23), and, transposing the items, it is as follows:—

Extra cost due to rounding.....	\$ 850	
Architect's fees for new plan.....	300	
These two items are admitted and allowed...	\$1,150	\$1,150
Sheeting up and removing sheeting from adjoining building (not put up until July or August, 1913, and after the time operations could have been resumed).....	\$120.11	
Removing brick (fall, 1915).....	50.00	
Removing hoarding (1914).....	10.00	
Attention to lights on street for a year and a half; need not have exceeded a few months.....	53.55	
Total.....	\$233.66	
Of this the arbitrator allowed.....		126
Extra charge by contractor (\$764 claimed) allowed at.....		624
Total allowed.....		\$1,900

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The small items allowed at \$126 (with the exception of, say, not more than \$20) are not attributable to any act of the city. There was nothing whatever to prevent O'Neil from appointing the Official Arbitrator at once after the passage of the by-law and proceeding with the reference and with the building operations at the same time. As to the extra claim made by Skipper Bros. for erecting the new building, the architect, Thompson, could not tell how it was made up. He suggested that they had originally tendered too low, and had increased the amount owing to the difference between winter and summer building. He admitted expensive alterations in design, and also very greatly increased expense owing to having to abandon the old foundations which came to be upon the city property. There was no application for tenders from other builders. If O'Neil had built in the summer of 1913, the expense of \$233.66 or at least \$200 of it would not have been incurred; and Thompson shews that the \$60 will not be paid if the contractor gets the lumber which is taken down. On the other hand, if O'Neil had built in the winter of 1913-14 the contractor would revert to winter prices, and the \$60 for hoarding might be proper. The charges for the other small items, excepting something for lighting, would not be incurred. In any case, the bulk of the extra sum claimed (without tenders) includes, approximately, steel work along Gerrard street front \$100 and mason work in foundation walls \$300 (see exhibit 15). This item should be reduced by \$400, and the allowance should be:—

Extra cost of rounding corner (material).....	\$ 850
Architect's fees (which I would have allowed at \$150 but for compromise agreement).....	300
Extra payment for building, including necessary expen- diture occasioned by delay.....	350
Total.....	\$1,500

As to the tenants Wagner & Hallat, they lose only floor space for the term of their lease, but they plainly fixed the amount of that loss by agreeing to pay the rent as of the whole building originally contemplated, in consideration of receiving the claim of their landlord against the city. That amount, as we have seen, is \$1,027.26.

It was agreed that they should have something for delay. The arbitrator has allowed \$1,000; I think \$100 would be sufficient.

The result will be that there should be paid to

Mrs. Gibson.....	\$ 850.83
To O'Neil.....	1,500.00
And to Wagner & Hallat.....	1,127.26
	<hr/>
	\$3,478.09,

with interest upon the first and \$1,027.26 of the third sum at 5 per cent. from the 1st May, 1913.

While there is no formal appeal by Mrs. Gibson, she should, if necessary, be allowed to appeal, *nunc pro tunc*, and then she should have no costs: if, however, she is content with the existing award, her costs should be paid by the city—and in any case those of the city should be paid by the other respondents.

The above results may be “proved” in this way. The amount to be paid by the city must be the same as though there were no leases at all and Mrs. Gibson were owner in possession. She would get:—

(1) The value of the land <i>quâ</i> land.....	\$1,700.00
(2) Severance.....	0.00
(3) Damages. The extra cost of a new building, etc.....	\$1,500.00
Loss of advantage of covenant by O'Neil to build, \$850.83, less \$672.74.....	178.09
And also the \$100 allowed for delay.....	100.00
	<hr/>
	\$3,478.09

MEREDITH, C.J.C.P., and LENNOX, J., concurred.

MASTEN, J.:—I have had the opportunity of perusing the reasons for judgment prepared by my brother Riddell.

I agree with the item of \$1,700 allowed for loss of land, and also that there is no damage to the freehold by severance. I also agree in the reduction of the item of \$1,900 to \$1,500, being allowance for expense occasioned by rounding the corner.

I am unable to see that as against the city Wagner & Hallat fixed the amount of their loss because they bought O'Neil's claim for damages, in consideration of agreeing to pay the rent on the basis originally contemplated.

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I think the three last items mentioned in the reasons for judgment of the learned arbitrator are excessive and are computed upon a wrong principle. The arbitrator is entitled to receive and consider evidence shewing the market value of the property before and after the expropriation. He is also entitled, in the case of a property of this kind, as a separate and independent line of inquiry, to receive and consider evidence as to the earning value of the property when applied to the most profitable use to which it can be put, and the result reached from each inquiry checks the other. But he is not entitled to use both these methods and make allowance on both footings in respect to the same property.

For this reason, I would eliminate the item of \$2,096 allowed by the arbitrator in respect of floor space.

With respect to the sum of \$1,000 for delay allowed by the arbitrator: this item seems to me rather large, but necessarily the allowance must be based on an estimate which cannot be accurately calculated, and it appears to me that the estimate of the arbitrator is nearer the correct allowance than the sum of \$100 which my learned brother has proposed to allow. Where an allowance of this kind is based upon an estimation, I feel great reluctance in interfering with the judgment of so experienced and competent an arbitrator. I should add, however, that in this particular case I concur in the allowance made by the arbitrator because I think that an interference with the premises of the character here described is bound to interfere gravely with, if not wholly to prevent, their use for any practically useful purpose for a period of two or three months. Theoretically it may be possible that it should not amount to more than a two weeks' interference, but practically such an alteration and interference with premises is bound to create a very great damage in connection with any operations, whether as a going business or in the way of building, which may be proceeding upon the premises.

I would, therefore, make the allowance as follows:—

To Mrs. Gibson.....	\$ 850.83
“ O'Neil.....	1,500.00
“ Wagner & Hallat.....	2,027.26
	<hr/> \$4,378.09,

with interest as proposed.

Award varied.

[IN CHAMBERS.]

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June 17.

RE REX v. SCOTT.

Constitutional Law—Liquor License Act, R.S.O. 1914, ch. 215, sec. 141—Amendments by 4 Geo. V. ch. 37, sec. 5, and 5 Geo. V. ch. 39, sec. 33—Intra Vires—“Municipality in which no Tavern or Shop License is Issued”—Municipality where Canada Temperance Act in Force—Application of sec. 141—Attempted Confinement to Local Option Municipalities—Effect of Headings in Statutes—3 & 4 Geo. 5. ch. 2 (O.)

Section 141 of the Liquor License Act, R.S.O. 1914, ch. 215 (as amended by 4 Geo. V. ch. 37, sec. 5, and 5 Geo. V. ch. 39, sec. 33), declaring that a person found drunk in a public place in a municipality in which a local option by-law is in force or in which no tavern or shop license is issued is guilty of an offence, is *intra vires* of the Ontario Legislature.

Hodge v. The Queen (1883), 9 App. Cas. 117, and *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, followed.

The section is applicable to the case of a person found in such a condition in a municipality where Part II. of the Canada Temperance Act is in force. Section 141 is grouped in R.S.O. 1914, ch. 215, with the sections immediately preceding and following it, under the heading “Local Option;” but the heading forms no part of the statute: Act respecting the Revision and Consolidation of the Statutes of Ontario, 3 & 4 Geo. V. ch. 2.

MOTION by the defendant for an order prohibiting the Police Magistrate for the Town of Seaforth from proceeding to hear or try a charge preferred against the defendant, as stated below.

May 9. The motion was heard by SUTHERLAND, J., in Chambers.

F. H. Thompson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

The Attorney-General for Canada was notified, but did not appear.

June 17. SUTHERLAND, J.:—A motion for an order prohibiting the Police Magistrate for the Town of Seaforth from proceeding to hear or try a certain charge preferred by John Torrance before him against John Scott, for that he was “on or about the 4th day of March, 1916 . . . in an intoxicated condition in a public place in the town of Seaforth, where no licenses are issued, contrary to the provisions of section 141 of the Liquor License Act and of the amendments thereto,” on the ground that the said Police Magistrate had no jurisdiction to entertain or try the charge, for the following among other reasons:—

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"1. That Part II. of the Canada Temperance Act having been brought into force in the county of Huron (including the town of Seaforth) on the 1st May, 1915, and being in force on the date of the alleged offence, the Liquor License Act was and is superseded by the said Canada Temperance Act so far as the municipalities of the county of Huron are concerned.

"2. That, even if the Liquor License Act were in force in the said town of Seaforth, section 141, as amended, must be read in the light of sections 139 and 140, and applies only to cases coming under said sections 139 and 140, and that there has never been a local option by-law passed in the said town of Seaforth.

"3. That said section 141 of the Liquor License Act, as amended, so far as it relates to municipalities without license, is *ultra vires* the Provincial Legislature."

For the purposes of the motion it is conceded on behalf of the Crown that Part II. of the Canada Temperance Act, R.S.C. 1906, ch. 152, went into force in the county of Huron (including the town of Seaforth) on the 1st May, 1915.

The Police Magistrate was proceeding to try the case, when objection was taken that the Liquor License Act was no longer in force in the town of Seaforth, having been superseded by the Canada Temperance Act; and that, even if it were, sec. 141 and the amendments thereto must be read in connection with the previous sections, being sections under the local option heading. A third objection, as to sec. 141 being *ultra vires* of the Provincial Legislature, was also taken.

A certificate was thereupon obtained from the Police Magistrate, which is in part as follows: "I hold that the Liquor License Act, and more particularly section 141 and the amendment thereto, is in force in the town of Seaforth."

Section 141 of the Liquor License Act, R.S.O. 1914, ch. 215, is as follows: "Where in a municipality in which a local option by-law is in force, a person is found upon a street or in any public place in an intoxicated condition owing to the drinking of liquor, he shall be guilty of an offence against this Act, and upon any prosecution for such offence he shall be compellable to state the name of the person from whom and the place in which he obtained such liquor, and in case of his refusal to do so he shall be imprisoned for a period not exceeding three months or until he discloses such information."

This section was amended in 1914, by 4 Geo. V. ch. 37, sec. 5, by inserting after the words "local option by-law is in force" the words "or in which no tavern or shop license is issued."

It was further amended in 1915, by 5 Geo. V. ch. 39, sec. 33, by adding after the words introduced by the amendment of 1914, the following words, "or where in unorganised territory," and by adding also to the said section the following clause: "In this section 'public place' shall include any place, building or public conveyance to which the public habitually resort or to which the public generally are admitted either free or upon payment of any charge or fee or by the purchase of tickets or otherwise."

It is contended that the whole of the Liquor License Act is superseded wherever the Canada Temperance Act is put in force, and that it was never intended to "parallel" the legislation.

It is said that what is attempted is, to create a new crime, namely, that of being intoxicated, and that this would be to invade the domain of sec. 91, clause 27, of the British North America Act, which deals with the criminal law. It is said that it is an attempt to deal with an offence against morality and make it punishable as a crime. Reference to *Regina v. Hodge* (1882), 7 A.R. 246, at p. 247, and *S.C., sub nom. Hodge v. The Queen* (1883), 9 App. Cas. 117; *Russell v. The Queen* (1882), 7 App. Cas. 829, at p. 839.

I am not able to see, however, that the section conflicts with anything in the Canada Temperance Act. If it did, the Dominion Act would govern.

In the head-note to *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, it was stated that "Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislatures."

In *Hodge v. The Queen*, 9 App. Cas. at p. 131, Sir Barnes Peacock, delivering the judgment of their Lordships, said: "Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated

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to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct."

In the Canada Temperance Act there is no attempt made to punish for this offence.

In *Regina v. Stone* (1892), 23 O.R. 46, at p. 49, Rose, J., expresses the opinion that Mr. Edward Blake, in his argument in *Regina v. Wason* (1890), 17 A.R. 221, 225, correctly stated the law as follows: "The jurisdiction of the Provinces and the Dominion overlap. The Dominion can declare anything a crime but this only so as not to interfere with or exclude the powers of the Province of dealing with the same thing in its civil aspect, and of imposing sanctions for the observance of the law; so that though the result might be an inconvenient exposure to a double liability, that possibility is no argument against the right to exercise the power." And that Mr. Justice Osler, at p. 241 of the same report, put it in this way: "I suppose it will not be denied that the latter" (i.e., the Parliament) "may draw into the domain of criminal law an act which has hitherto been punishable only under a Provincial statute."

In the argument before me the main stress was laid on the part of the applicant on the point that sec. 141, as amended, must be read in the light of secs. 139 and 140, and applied only to cases coming under the said sections. Sections 139 and 140 are, of course, local option by-law sections. The argument, however, ignores the fact that, by sec. 9, sub-sec. 4, of the "Act respecting the Revision and Consolidation of the Statutes of Ontario," 3 & 4 Geo. V. ch. 2, it is provided that "the marginal notes and headings in the body of the Revised Statutes and references to former enactments, and sections printed in bourgeois type which may appear thereon, shall be held to form no part of the said statutes but to be inserted for convenience of reference only."

It was argued that the question dealt with in the section would be, if anything, a matter of municipal regulation. It is, of course, the Province that gives to the municipality its power.

I am of the opinion that sec. 141 of the Liquor License Act, as amended, is *intra vires* of the Ontario Legislature, and has not been superseded by the Canada Temperance Act; and that the motion, on all grounds, must be dismissed.

The motion will, therefore, be refused with costs.

[The defendant appealed from the order of SUTHERLAND, J. A Divisional Court of the Appellate Division (MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.A., and RIDDELL, J.), on the 8th November, 1916, ordered that the appeal should be quashed.]

[IN CHAMBERS.]

1916

June 19.

REX v. GRAND TRUNK R.W. Co.

Municipal Corporations—By-law respecting Emission of Smoke—Municipal Act, R.S.O. 1914, ch. 192, sec. 400 (45)—Convictions of Railway Company for Offences against By-law—Locomotives in Round-house—Ventilating Flue—"Flue, Stack or Chimney"—Dominion Board of Railway Commissioners—Regulations—Offence against—Offence Committed by another Railway Company.

The defendants, a Dominion railway company, were convicted by the Police Magistrate for a city of two offences against a by-law of the city passed pursuant to sec. 400 (45) of the Municipal Act, R.S.O. 1914, ch. 192. It appeared that the smoke complained of was emitted by locomotive engines standing in the railway round-house; the smoke passing up the ventilating flue or chimney of the round-house. One of the offences was the emission of smoke by a locomotive of another railway company, standing in the defendants' round-house:—

Held, that the ventilating flue of a round-house is not a "flue, stack or chimney," within the meaning of the statute.

Rex v. Canadian Pacific R.W. Co. (1915), 33 O.L.R. 248, followed.

(2) That, if the evidence disclosed an offence against the regulations of the Dominion Board of Railway Commissioners, it would not be proper to amend the convictions so as to bring them under the regulations.

(3) That, it not being shewn that the other railway company were authorised by the defendants to do what constituted one of the offences, the defendants could not be made criminally liable therefor.

Convictions quashed.

MOTION by the defendant company to quash two convictions, as set out below.

June 16. The motion was heard by MIDDLETON, J., in Chambers.

D. L. McCarthy, K.C., for the defendant company.

F. D. Davis, for the informant.

June 19. MIDDLETON, J.:—Motion to quash a conviction made by the Police Magistrate for the City of Windsor, convicting the Grand Trunk Railway Company for that "it did on the 20th May, 1916, being the owner or manager of a locomotive steam engine in the Grand Trunk Railway round-house, in which a fire was burning, cause or permit the emission to the atmosphere from said fire of opaque or dense smoke for a period of more than six minutes," and a similar conviction for the same offence, laid as having been committed on the 26th April. These offences are said to be against the provisions of a by-law of the Corporation of the City of Windsor.

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It appears that the smoke complained of was emitted by locomotives while standing in the railway round-house. This smoke would pass up the ventilating flue or chimney of the round-house.

The magistrate has taken the view that, so long as the smoke ultimately was emitted from the chimney or flue of the round-house, it does not make any difference that the smoke was actually generated in a locomotive engine. On the occasion of the 20th May, the smoke was emitted by a Wabash engine—a company which apparently has running rights on the Grand Trunk Railway; but this, in the view of the magistrate, makes no difference, for the fact was that, no matter what its origin, smoke was emitted from the chimney or flue of the Grand Trunk building. The fact that the smoke was originating in engines, and passed through the chimney of the building before being discharged into the atmosphere, in the magistrate's opinion distinguishes this case from the decision in *Rex v. Canadian Pacific R.W. Co.* (1915), 33 O.L.R. 248.

In that case I came to the conclusion that a Dominion railway is not subject to the provisions of a municipal by-law; that it is subject only to the regulations of the Dominion Railway Board. Upon appeal, my decision quashing the conviction was upheld; the appellate Court expressing no view as to the grounds upon which I relied, but holding that the smoke-stack of a locomotive engine is not a "flue, stack or chimney" within the meaning of the Municipal Act, R.S.O. 1914, ch. 192, sec. 400,* clause 45. Following this, I am prepared to hold that the ventilating flue of a round-house, constructed for the purpose of carrying away smoke or fumes that may be discharged into the atmosphere of the round-house, and conducting them to a place where they would presumably be less objectionable; is not a "flue, stack or chimney" within the statute.

*400. By-laws may be passed by the councils of urban municipalities.

45. For requiring the owner . . . or occupant of any premises in, or of a steam boiler in connection with which a fire is burning and every person who operates, uses or causes or permits to be used any furnace or fire, to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney.

Upon the argument before me it was suggested that the evidence disclosed an offence against the regulations of the Dominion Railway Board. It is sufficient to say that this is not the way the case was presented, and I do not think it would be right for me to seek to amend a conviction so as to attempt to uphold it as being for an offence against a totally different statute.

It also appears to me that in the one conviction the offence, if any, was committed by the Wabash Railroad Company, and that, it not being shewn that what was done by that company was in any way authorised by the Grand Trunk Railway Company, it cannot be made criminally liable for the act of another company merely because that company has a running right over its road.

The convictions will be quashed, with costs to be paid to the Grand Trunk Railway Company by the informant; and the usual protection order will be made.

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[BOYD, C.]

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June 20.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim of Mortgage-creditor to Rank on Estate—Valuing Security—Contestation of Claim by Assignee—Assignments and Preferences Act, secs. 25 (4), 27—Election of Creditor by Virtue of Proceedings in Foreclosure Action—Actual Redemption or Foreclosure not Reached—Action to Establish Claim—Terms of Relief—Costs.

After S. had made an assignment for the benefit of his creditors, under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, the plaintiff, a mortgage-creditor of S., began an action upon the mortgage against S. and his assignee, the defendant, for foreclosure. Shortly afterward, the plaintiff filed his claim on the mortgage against the estate of S. in the hands of the defendant, valuing his mortgage security at a given sum, and claiming to rank for the balance of his claim. The defendant served notice of contestation of the plaintiff's whole claim, under sec. 27 of the Act, basing his opposition on the disability of the plaintiff to proceed under the Act by reason of his having elected to enforce his security by action on the mortgage. Thereafter, judgment for the plaintiff in the mortgage action went by default; the judgment was in the usual form, directing a reference for redemption or foreclosure, and ordering payment by the defendants of the amount which should be found due. After that judgment, the plaintiff brought this action to establish his claim against the estate to rank for the amount of his claim over and above the value placed on the security.

The actual redemption or foreclosure not having taken place, and the plaintiff proposing to forgo any right to foreclose if his claim to rank on the estate should be established, it was held, that the fact of the foreclosure action having been begun and prosecuted was not *per se* sufficient to debar the plaintiff from bringing in the property and having his claim disposed of

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under sec. 25 (4) of the Act, and he was entitled to a judgment so declaring, upon his consenting to a dismissal of the mortgage action as against the defendant.

In re Hurst (1871), 31 U.C.R. 116, followed.

Held, also, that the plaintiff should be paid his costs of this action by the defendant, but without prejudice to the amount thereof being recouped and the defendant's own costs paid out of the assets in his hands upon an administration thereof in due course.

Grant v. West (1896), 23 A.R. 533, 540, followed.

MOTION by the plaintiff for judgment on the pleadings in an action by a mortgage-creditor of one Steen, who made an assignment to the defendant for the benefit of creditors, under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, for a declaration of the plaintiff's right to rank upon the estate of Steen in the hands of the defendant, as assignee, for the amount of a claim made by the plaintiff against the estate.

June 19. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

J. A. Paterson, K.C., for the plaintiff.

Frank Denton, K.C., for the defendant.

June 20. BOYD, C.:—I summarise the dates and order of proceedings:—

Second mortgage, 30th September, 1912, on 242 Queen street west, for \$13,500, with interest at 6 per cent. half-yearly, by Jacob Steen to Barber.

Steen assigned under the statute, for the benefit of creditors, to Stephenson, on the 7th January, 1916, and thereafter, on the 14th January, 1916, the defendant Wade was appointed assignee of the estate, at a creditors' meeting.

On the 16th February, the mortgagee began an action upon the mortgage against the mortgagor and his wife and the two assignees, for foreclosure, and therein entered judgment for the amount claimed, with a reference to the Master, on the 8th April, 1916.

On the 24th February, 1916, the plaintiff duly filed his claim on the mortgage with the assignee Wade, at the sum of \$14,266, including interest and taxes, and he valued his security at the sum of \$13,200.

On the 1st April, the assignee served notice of contestation of the said claim, and that, if an action to establish the claim was

not brought within 30 days, the claim to rank upon the estate would be forever barred.

Within the 30 days, and on the 29th April, 1916, the plaintiff brought this action to establish his claim, and asks a declaration to be entitled to rank on the estate for \$1,066, the amount of his claim over and above the value placed on the security.

The defence of the assignee sets up that on the 14th February, 1916, the action was brought against the mortgagor and assignees to foreclose, wherein judgment was entered on the 8th April, 1916; and the contention is raised that the institution of the action to foreclose, subsequent to the assignment for creditors and prior to the filing of his claim with the assignee on the 24th February, 1916, was an election to accept the mortgage held by the plaintiff in full of his claim, and an abandonment of any right to rank upon the assets held for the benefit of other creditors.

The judgment in the action on the mortgage went by default, and is in the usual form, that all necessary inquiries be made, and accounts taken, costs taxed, and proceedings had for redemption or foreclosure, with an order for payment by the defendants of what may be found due after the Master has reported, and upon such payment the mortgaged premises are to be conveyed and assigned accordingly.

Time is current under the report, and the actual redemption or foreclosure has not yet taken place. The plaintiff proposes to forgo any right to foreclose if his claim to rank on the estate is established.

The question is, whether it is too late to do so—whether the bringing and the prosecution of the foreclosure action so far was an irrevocable election so to enforce or realise the mortgage security. The point does not seem to have been expressly decided, and both parties rely on the same line of authorities.

The provisions of the statute (R.S.O. 1914, ch. 134, sec. 25(4)) are that the creditor shall state whether he holds a security for his claim, and he shall put a specified value thereon, and the assignee, under the authority of the creditors, may either consent to the creditor ranking for the claim after deducting such valuation, or he may call for an assignment of the security at an advance of 10 per cent. upon the valuation. In the latter event, the amount for which the creditor shall rank and vote is the

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difference between the value at which the security is retained and the amount of the gross claim of the creditor.

In the present controversy, the proceedings have not reached this stage, inasmuch as the assignee gave, under sec. 27, notice of contestation of the whole claim, basing his action on the disability of the claimant to proceed under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, by reason of his having taken another way, by action on the mortgage, of enforcing his security.

Our present statutory law is based on provisions to a like effect in the earlier Insolvent Acts of 1864 and 1875; and the general policy of the Legislature is that creditors, after an assignment in insolvency or for the general benefit of creditors, cannot go on and deal with their securities as if no assignment had taken place, by realising and selling the property as they think proper, and afterwards, in the event of any shortage, seek to come in and rank upon the estate therefor on the footing of the other creditors. The mere fact of disposing of the security, by sale or otherwise, so as to put it out of the power of the mortgagee to bring it under the jurisdiction and control of the assignee for creditors, would be an absolute and unequivocal act of election not to rank on the estate. Short of this, the acts and conduct of the mortgagee are to be considered as to how far they have interfered with the rights of the creditors generally to have the assets ratably and equitably distributed.

The fact of an action to foreclose having been begun and prosecuted is not *per se* sufficient to debar the mortgagee from bringing in the property and dealing with it under ch. 134, for thereby the position of affairs as to the assets will be the same as if no action had been begun. All that is now claimed is what is due under the mortgage, with interest and taxes, and the pendency of the action may be regarded as negligible.

As a term of relief, I think the mortgage action should be dismissed as against the assignees, but without costs, as none have been by them incurred. It is premature to make any declaration as to the amount for which the plaintiff should rank upon the estate.

The judgment should declare that the plaintiff is entitled to rank upon the estate in the defendant's hands, and that his claim is to be dealt with by the defendant having regard to the provisions of the Act ch. 134, sec. 25 (4).

The plaintiff should be paid costs of action by the defendant, but without prejudice to the amount thereof being recouped and the defendant's own costs being paid out of the assets in the hands of the defendant upon an administration thereof in due course. See *Grant v. West* (1896), 23 A.R. 533, 540.

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I have found *In re Hurst* (1871), 31 U.C.R. 116, helpful as to the cardinal matters on which the Court is at one; though some of the observations therein have been subject to later judicial criticism.

[IN CHAMBERS.]

RE HUNTER.

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June 21.

Lunatic—Committee—Trust Company—Investment of Moneys of Estate—Payment into Court—Lunacy Act, sec. 11 (d).

A trust company appointed committee of the estate of a lunatic can, under its statutory powers, act without giving security; but this does not enlarge its powers in dealing with the funds of the lunatic's estate. Yearly balances must be paid into Court: sec. 11 (d) of the Lunacy Act, R.S.O. 1914, ch. 68; and this rule must be strictly followed.

Re Norris and *Re Drope* (1902), 5 O.L.R. 99, 101, and *Re Rourke* (1915), 33 O.L.R. 519, followed.

The report of a Master authorising the investment and re-investment by a company-committee of the lunatic's funds and the application of the interest and part of the capital for his maintenance, was varied, upon motion for its confirmation, by directing payment into Court.

MOTION by the National Trust Company, committee of the estate of a lunatic, for an order confirming the report of a Local Master.

June 20. The motion was heard by BOYD, C., in Chambers. *G. M. Willoughby*, for the committee.

K. W. Wright, for the Inspector of Prisons and Public Charities.

June 21. BOYD, C.:—The Master has appointed the National Trust Company as committee of the estate of the lunatic.

That company, as trustee of the estate of R. A. Hunter, has moneys and assets in its hands payable or to be payable to the said lunatic, and there are also other items of personal property belonging to the lunatic.

The Master submits a scheme for the management of the estate and the maintenance of the lunatic, of which I cannot

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approve. His suggestion is, that the committee get in all the property and invest and re-invest the same in proper trustee-securities, and thereout pay the interest, and, if necessary, part of the capital, to defray the annual charge of \$312 to the Hospital for the Insane at Hamilton, and also to pay thereout \$300 for past maintenance, and a further sum not exceeding \$75 a year for clothing etc.

The report is right enough in directing the committee of the estate forthwith to realise all available property and turn it into cash, but it is wrong in directing this to be administered and invested by the committee. True it is that the company-committee, under its statutory powers, can act without security; but this does not enlarge its powers in dealing with the fund collected and got in belonging to the lunatic. When security is to be given, it is to be, among other things, for paying any yearly balance into Court. This provision for safeguarding the fund was originally in the form of a General Order; it is now embodied in the statute, the Lunacy Act, R.S.O. 1914, ch. 68, sec. 11 (d); and the Courts have again and again emphasised the importance of strict adherence to this disposition of the funds representing the bulk of the lunatic's property. In 1902, the rule and the reasons for the rule were plainly set forth in *Re Norris* and *Re Drope* (1902), 5 O.L.R. 99, 101; and the same point was again emphasised in 1915: *Re Rourke* (1915), 33 O.L.R. 519.

The judicial officers of the Court should keep this rule in prominent view; and not, under references to them, treat it as non-existent, and in effect seek to frustrate the statute. Solicitors should also not endeavour to get reports framed which will call for the intervention of the Court to put them right, and so really disserve their clients by being zealous overmuch. They, too, are officers of the Court, sworn to its legal service, and should not seek in these (generally) unopposed references to gain supposed advantages which, upon observation or disclosure, the Court will not sanction.

Modified as I have indicated, the report may otherwise stand affirmed; but no costs are to be allowed as to this motion or of any evidence which induced the error to be made which is now corrected.

[HODGINS, J.A.]

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June 21.

DRUMBOLUS v. HOME INSURANCE CO.

Fire Insurance—"Direct Loss or Damage by Fire"—*Damage Caused by Freezing*—"Property Owned by any other Person"—*Statutory Condition 6 (a)—Goods not Paid for in Full—Property not Passing—Ownership of Assured—Order upon Insurers for Payment of Portion of Insurance Moneys to Stranger—Right of Assured to Recover—Protection of Rights of Strangers—Payment into Court—Notice.*

In an action upon a policy insuring against fire the furniture and fittings of an "ice-cream parlour," it appeared that the fire in respect of which loss was alleged occurred in winter, and did not spread above the floor of the "parlour." In order to confine it below, the pipe and door of the furnace were taken off, with the result that the water froze in the pipes and plumbing fixtures of the fountain and carbonator:—

Held, that the damage was the immediate consequence of the fire and the method adopted of dealing with it, and so was recoverable as "direct loss or damage by fire."

(2) By statutory condition 6 (a) (Ontario Insurance Act, sec. 194), an insurance company is not liable for the loss of property *owned* by any other person than the assured, unless the interest of the assured is stated in or upon the policy. The policy insured the fountain and attachments, "the property of the assured," and these were injured in consequence of the fire:—

Held, that the plaintiff was entitled to recover for this portion of the loss, notwithstanding that these articles were not paid for in full, and that by the sale-agreement the ownership was not to pass to the plaintiff until payment in full—that agreement also providing that the goods were to be at his risk, and that he was to keep them insured "with loss payable to the vendors as their interest may appear." The articles were his "property" in the popular sense; and "owner" is not synonymous with "holder of an exclusive title."

(3) The plaintiff had given an order upon the defendants to pay M. a sum of money out of the amount due upon the policy:—

Held, that whether the order divested the plaintiff of the right to sue for that sum and vested it in M. could not be decided in the absence of M.; and, so far as appeared, the plaintiff's right to sue was not affected.

It was ordered that the whole amount found due by the defendants should be paid into Court, and should not be paid out except on notice to M. and also to the vendors of the fountain and accessories.

ACTION upon a fire insurance policy.

The action was tried by HODGINS, J.A., without a jury, at Port Arthur.

J. C. Ross, for the plaintiff.

F. Babe, for the defendants.

June 21. HODGINS, J.A.:—The only issues argued before me were: (1) whether the amount of the loss had been ascertained by arbitration under statutory condition 21; (2) the actual quantum of the plaintiff's loss; (3) those raised by paragraphs 3 and 4 of the statement of defence. I mention these specifically, as the

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defendants have set up in their pleadings almost every conceivable bar to the plaintiff's recovery—a course which cannot be too strongly condemned.

I decided that no binding arbitration had been proved, and my reasons therefor were given during the progress of the case.

The fire occurred under the plaintiff's ice-cream parlour in Port Arthur.

As to the amount of the loss, apart from the questions affecting it under paragraphs 3 and 4 of the defence, the evidence conflicts; but that called by the plaintiff was generally of a speculative or theoretic nature. The plaintiff's claim was thus given:—

[The learned Judge then set out the particulars of the plaintiff's claim, that is, the articles destroyed or damaged by the fire and the figures shewing the loss upon each article, as stated by the plaintiff. The total amount claimed was \$2,058.50.]

In dealing with the claim it may be premised that the business was resumed after the fire, and all the payments for restoration which the plaintiff could recall came to \$326.50. The fire occurred on the 4th January, 1915, and the plaintiff began business again on the 15th May, 1916, without any new fixtures.

I deal with the items as follows, after considering the various estimates and tenders as well as the evidence in support thereof, and comparing, as best I can, the expenditure of the plaintiff on these articles or on substitutes for those destroyed. The amounts allowed, I think, fairly represent the damage proved, whether taken singly or as a whole. It is quite impossible to arrive at an exact result on each item as a mathematical problem, as the knowledge, experience, and observation of the witnesses differ considerably, and so do their figures, and it would serve no useful purpose to set out the various steps by which I arrived at the result of each item.

	Claimed	Allowed at
Mirrors.....	\$ 200.00	\$ 75.00
Palms and ferns.....	110.00	110.00
64 ice-cream chairs.....	177.00	137.00
16 ice-cream tables.....		
10 ice-cream fountain stools....		
Mirror frames and painting panels.....		
3 display show-cases		

	Claimed	Allowed at	Hodgins, J.A. 1916
Linoleum.....	\$160.00	\$160.00	
Ice-cream fountain and acces- sories, marble and silver finish.....	1,000.00	300.00	DRUMBOLUS v. HOME INSURANCE Co.
Computing scales.....	10.00	} included in other items allowed	
Cash register.....	1.50		
1 hot water urn.....	10.00		
Ice-cream glasses.....	3.00	3.00	
Candy-pans and ice-cream trays.....	12.00	12.00	
Outside swing-door.....	5.00	5.00	
Miscellaneous items.....	20.00	10.00	
Carbonator and motor.....	240.00	90.00	
<hr/>		<hr/>	
Total allowed..		\$902.00	

I think the damage, both to the ice-cream fountain and accessories and to the carbonator and motor, is within the terms of the policy. The fire did not spread above the floor of the ice-cream parlour; but, in order to confine it below, the pipe of the furnace and the door were taken off. The result was that the water froze in the pipes and plumbing fixtures of the fountain and carbonator. This was the immediate consequence of the fire and the method adopted in dealing with it, and so may be recovered for as "direct loss or damage by fire." See *Stanley v. Western Insurance Co.* (1868), L.R. 3 Ex. 71, per Kelly, C.B.; *Lewis v. Springfield Fire and Marine Insurance Co.* (1857), 10 Gray (Mass.) 159; *Inglis v. Stock* (1885), 10 App. Cas. 263, per Lord Blackburn; *Thompson v. Montreal Insurance Co.* (1849), 6 U.C.R. 319; *McLaren v. Commercial Union Insurance Co.* (1885), 12 A.R. 279.

I cannot think that, even if the plaintiff had been on hand, he could be blamed for not having, in the middle of the night, rehung the door, battened up the place, connected and relighted the furnace. This would be imposing on him somewhat unreasonably, and his not doing these things cannot disable him from recovering.

There remains the question as to what is the effect, on the

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plaintiff's recovery, of the McLaughlin agreement, proved as exhibit 5, and the Murray order, proved as exhibit 6.

The policy insures the soda-water fountain and attachments, "the property of the assured." The application was not proved, so that the intention must be determined by the words of the policy.

Statutory condition 6 (a) (Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 194) is as follows:—

"6. The company is not liable for the losses following, that is to say:

"(a) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy."

Condition (1) of exhibit 5 reads: "The ownership of property in and title to the goods shall remain in the vendors, and shall not pass to the purchaser until the purchaser has paid the purchase-price," etc.

Condition (3) of exhibit 5 provides that: "During the possession and use as aforesaid the goods shall be at the risk of the purchaser as to damage and destruction from any cause" etc.

Condition (14) of exhibit 5 requires the purchaser to keep the goods insured against loss or damage by fire "with loss payable to the vendors as their interest may appear."

In exhibit 5 the parties are described as vendor and purchaser respectively, and in the letter written by McLaughlin & Company to the defendants' adjuster, on the 20th January, 1916, they give as their understanding of the contract that "the purchaser is to carry insurance on the equipment at all times to equal at least the amount of our unpaid balance and accrued interest with the loss of the policy made payable to our firm." They also speak of their claim as a lien.

I think, under these circumstances, that the plaintiff may maintain an action for this portion of the loss. The fountain and accessories etc. are his "property" in the popular sense, though the legal title is in the McLaughlins. Out of \$1,890 he has paid all but \$730, and interest. There is nothing to shew that the defendants wanted any information about the legal title, or were concerned in anything except that the assured had property which was capable of insurance by him as his own.

Upon the wording of the condition itself, the term "owner" is not synonymous with "holder of an exclusive title:" *Hopkins v. Provincial Insurance Co.* (1868), 18 U.C.C.P. 74; *J. Gainor & Co. v. Anchor Fire and Marine Insurance Co.* (1913), 24 W.L.R. 656.

The McLaughlins are not really "owners," although the property in the fountain remains in them until payment. They have agreed to sell it, and their contract recognises an interest in the plaintiff (see condition 13), and especially in dealing with the insurance required to be kept up (condition 14), i.e., to the full insurable value, though the loss is payable to the McLaughlins only "as their interest may appear." See *Ryan v. Agricultural Insurance Co.* (1905), 188 Mass. 11; *Keefer v. Phoenix Insurance Co. of Hartford* (1901), 31 S.C.R. 144.

I am, therefore, unable to hold that the defendants can escape payment of the amount allowed as damage in respect to the fountain and other things covered by exhibit 5 as being in respect of property owned by any other person than the assured.

Although there is nothing to shew that the facts relating to the McLaughlin title were communicated to the defendants when the application was made, I regard the case of *Davidson v. Waterloo Mutual Fire Insurance Co.* (1905), 9 O.L.R. 394, as affording authority for this opinion. And the amount allowed is not in excess of the plaintiff's cash interest in the fountain etc.

The order given in favour of Murray, exhibit 6, is merely a direction to pay him \$550 out of the moneys due under the policy. Whether it is an assignment in law of that amount so as to vest the right to sue for it in Murray, and to divest it out of the plaintiff, cannot now be finally decided, in the absence of Murray. But, so far as appears before me, the plaintiff still has the right to sue for the amount due on the policy.

Judgment will therefore go in favour of the plaintiff for the sum of \$902, with interest from the date of the writ, and full costs of suit; the \$750 already in Court to remain there, and the balance of \$152 to be paid into Court. No part of either amount is to be paid out except on notice to McLaughlin & Company and Murray. Any party interested may apply on notice in Chambers for payment out.

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[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

June 23.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railway—Agreement with City Corporation—55 Vict. ch. 99 (O.)—Construction and Effect—Exclusive Right to Operate upon Streets—Exception—Restriction—Expiry of Franchise of another Railway—Right to Operate upon Portion of Street Released.

Held, affirming the judgment of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, *Re Toronto R.W. Co. and City of Toronto* (1915), 34 O.L.R. 456, that, upon the proper construction of the agreement made between the parties in 1891 and validated by the Ontario statute 55 Vict. ch. 99, the Toronto Railway Company had the right, from and after the 25th June, 1915, when the rights of the Metropolitan Street Railway Company ceased, to operate upon the portion of Yonge street from the Canadian Pacific Railway tracks to the north limit of the city of Toronto.

Section 1 of the validating statute explained and its language reconciled with the conditions expressed in the agreement itself.

Toronto R.W. Co. v. Toronto Corporation, [1906] A.C. 117, referred to as not governing this case.

The judgment of the Court of Appeal for Ontario in *City of Toronto v. Toronto R.W. Co.* (1905), 5 O.W.R. 130, approved.

APPEAL by the Corporation of the City of Toronto from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, *Re Toronto R. W. Co. and City of Toronto* (1915), 34 O.L.R. 456.

May 26. The appeal was heard by a Board composed of THE LORD CHANCELLOR (LORD BUCKMASTER), EARL LOREBURN, and LORD SHAW.

A. C. Clauson, K.C., and G. R. Geary, K.C., for the appellants.

Sir John Simon, K.C., and D. L. McCarthy, K.C., for the Toronto Railway Company, respondents.

June 23. The judgment of the Board was delivered by THE LORD CHANCELLOR:—This appeal has arisen out of an application by the respondent company to the Ontario Railway and Municipal Board, under sec. 250 of the Ontario Railway Act of 1914, 3 & 4 Geo. V. ch. 36, asking the approval of plans for a proposed extension of a street railway. The Board made an order in favour of the respondents upon this application on the 9th September, 1915; from this order the present appellants appealed to the Appellate Division of the Supreme Court of Ontario, by whom the order of the Railway Board was confirmed; and the present appeal is against that judgment.

On the original hearing, certain technical objections were taken on behalf of the appellants, but these were summarily overruled by the Railway Board, who regarded them as devoid of substance or merit. Such objections do not admit of elaborate argument, and, although maintained before the Supreme Court and on the hearing of this appeal, it is unnecessary for their Lordships to deal with them further than by saying they are quite satisfied the decisions of the Board and of the Supreme Court were correct.

The real substance of the dispute depends upon the construction of an agreement made on the 1st September, 1891, between the appellants and the predecessors in title of the respondents, by which powers were granted for creating street railways over streets within the jurisdiction of the city, and of a statute by which that agreement was confirmed.

The appellants, as the governing body of the City of Toronto, have power to grant rights of running tramways or street railways over all the streets within their jurisdiction, subject to the limitations imposed on their authority by the provisions of the Street Railway Act of 1887, a statute which provided that no municipal council shall grant to a street railway company any such privilege for a longer period than twenty years. The boundaries of the city have from time to time been altered. In 1884 and up to 1887, the northern boundary extended to a line drawn east and west through the junction of a street known as Yonge street and the Ontario and Quebec Railway tracks, now the Canadian Pacific Railway. The roads north of this point were, at this date, vested in the County of York, by whom the powers of granting railway rights over these portions of the roads were enjoyed and exercised. By virtue of two agreements, made respectively in 1884 and 1886, between the County of York and the Metropolitan Street Railway Company of Toronto, the County of York, in exercise of such powers, granted to the Metropolitan Street Railway Company the right to construct a street railway along Yonge street, northwards from the northern limit of the city boundary as it was then constituted. These rights were subject to forfeiture in certain events, but, unless forfeited or otherwise extinguished, the rights continued until the 25th June, 1915.

No doubt whatever has arisen as to the power of the County

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of York to enter into these agreements, or to the extent or validity of the rights obtained by the Metropolitan Street Railway Company under their terms; and, indeed, the Corporation of the City of Toronto would have had no direct right or interest in the streets at all but for the fact that the municipal boundaries of the city were, in 1887, extended in a northerly direction for an extent of some 1,320 feet. The effect of this was to place the portion of Yonge street and the other streets lying within this extended area under the jurisdiction of the city, and this portion of the roads was accordingly conveyed to the appellants by the County of York, but such conveyance was expressly made subject to all existing rights of the public or any person or corporation, and, in particular, to the rights of the Metropolitan Street Railway Company in respect of the road known as Yonge street.

In 1891, the appellants determined to offer for sale the right to operate street railways upon their streets, a tender made by the predecessors in title of the respondents for the purchase of these rights was accepted, and the agreement which has caused this dispute was entered into on the 1st September, 1891, to carry the purchase into effect. By this agreement the corporation granted to the purchasers, for a period of twenty years from the date of the agreement, and a further term of ten years, if legislative authority could be obtained for such extension, "the exclusive right . . . to operate surface street railways in the city of Toronto, excepting on the island and on that portion, if any, of Yonge street from the Ontario and Quebec Railway tracks to the north city limits, over which the Metropolitan Street Railway Company claims an exclusive right to operate such railways, and the portion, if any, of Queen street west (Lake Shore road) over which any exclusive right to operate surface street railways may have been granted by the corporation of the County of York, and also the exclusive right for the same term to operate surface street railways over the said portion of Yonge street and Queen street west (Lake Shore road) above indicated, so far as the said corporation can legally grant the same." This agreement was, as is shewn upon its face, in excess of the powers of the corporation, and the necessary statute for its confirmation was obtained on the 14th April, 1892. On the 25th June, 1915, the rights of the Metropolitan Street Railway Company ceased over that portion of Yonge street which was brought within the

boundary of the city in 1887; and the respondents accordingly claimed that, by virtue of their agreement, they were then entitled for the residue of the term which such agreement created, to use this portion of the street for the purpose of their railway. The appellants deny that the agreement conferred any such right. They assert that, at the date of the agreement, the corporation had no power legally to grant any franchise over this portion of Yonge street; and that, consequently, the only rights that were conferred in respect of this area were those that would have arisen if the grants to the Metropolitan Street Railway Company, made by the County of York, had for any reason been found to have been invalid and void on the 1st September, 1891.

Their Lordships are quite unable to take this view. At the date of the agreement no question whatever existed and no doubt had arisen as to the rights possessed by the Metropolitan Street Railway Company. Such rights were regarded by all parties as valid and subsisting, capable no doubt of termination in certain events, but, unless those events occurred, continuing on to the 25th June, 1915. Subject to those rights, whatever they might be, and subject to the restrictions imposed by the Street Railway Act of 1887, the municipal authorities of the City of Toronto had full power to deal with the franchise of these roads in such a manner as they thought would best serve the interests of the inhabitants of the municipality. The agreement that was made granted a term of years beyond the authorised period; but it was intended to apply for legislation authorising this extension, and the agreement must be construed throughout upon the hypothesis that this authority would be, as in fact it was, duly obtained. The grant, therefore, was to run street railways in the city of Toronto for a total period of thirty years, with an absolute exception in respect of the island and a limited exception in respect of those parts of Yonge street and Queen street where exclusive rights had been granted by the County of York. So far, however, as the excepted portions of those streets were concerned, a grant for the same period was made by the corporation, so far as they could legally grant the same, that is, so far as they could legally grant the same if the agreement was effectively confirmed by a subsequent statute. The only colour of explanation that can be given by the appellants of the distinct grant on the part of the City of Toronto over these excepted portions of the street is

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that to which reference has already been made, namely, that the grant to the Metropolitan Street Railway Company might be declared to be void, *ab initio*, or to have ended before the 1st September, 1891—a contingency which nobody contemplated, and which there was no reason or justification to apprehend. The only meaning, in their Lordships' opinion, which this agreement is capable of bearing is that the grant it contained, which was made for good consideration, was a grant which would take effect whenever such antecedent rights were for any reason to cease.

It has been suggested in argument that such a grant would be beyond the powers of the corporation as creating a reversionary interest in the franchise of the roads. No authority whatever was produced to aid this contention, and their Lordships are unaware of any principle that could be invoked in its support.

It is also said that such a power is open to abuse, and so doubtless are all powers enjoyed by municipal authorities, but it would be a wrong and dangerous method of determining the true limits of such powers to consider the mischief their improper exercise might produce.

Their Lordships consider that the terms of the agreement itself do not, when once the facts are understood, present any real difficulty. It is the manner in which these rights have been confirmed by statute which gives rise to the only question of uncertainty in the case. This statute is 55 Vict. ch. 99, secs. 1, 4 (1). Its description, to which reference is permissible for the purpose of determining its construction, is stated to be an Act to incorporate the Toronto Railway Company and to confirm an agreement between the Corporation of the City of Toronto and certain persons called the purchasers. The agreement and the conditions and tenders referred to are set out in the schedule to the statute in the usual way, and are declared to be valid and legal, and binding upon all the parties. So far as the statute sought to validate and confirm the agreement, nothing further than this was required; but, as is not unusual in statutes of this description, the Act proceeded to explain the effect of the agreement, and it is the difference between the terms in which this explanation is given and the terms of the agreement itself which has caused all the confusion in the case. The actual words which give rise to the difficulty are these (sec. 1): "It is hereby declared that

under the said agreement the purchasers acquired and are entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said city of Toronto, except that portion of Yonge street, north of the Ontario and Quebec Railway, and that portion of Queen street (Lake Shore road) west of Dufferin street; and that the purchasers acquired and are entitled to such right and privilege (if any) over the said excepted portions of Queen street and Yonge street as the Corporation of the City of Toronto had at the time of the execution of said agreement power to grant for a surface street railway."

Now, in the first place, it is remarkable that the island, which was totally excepted from the terms of the original grant, is not excepted at all from the description given in the Act of Parliament; and, if the words of the statute were taken to be those which defined and created the rights of the purchasers, they would be entitled to use the island for the purpose of their street railway, although it had been carefully excluded from the terms of the purchase.

Their Lordships think that in an Act of this description a provision, of the nature mentioned, is to be regarded rather by way of explanation and identification of the agreement which has been confirmed, than by way of creation of actual and independent rights. But, even if they were to be otherwise regarded, in their Lordships' opinion, the statute merely expresses in clumsy and obscure language exactly the same conditions as those expressed in the original agreement. The right and privilege, if any, over the excepted portion of Yonge street, which the City of Toronto at the time of the execution of the agreement had power to grant, were the rights and privileges which were to commence when the existing franchise ended. It is quite true that, if that franchise ran its full length, apart from the Act of Parliament, there would have been no right or privilege which the corporation could grant at all. But the statute must be read in light of the fact that the agreement was thereby validated, and the right and privilege which the corporation had power to grant at the date of the agreement must be construed as meaning the right and privilege which the corporation had power to grant, assuming—for this was the whole basis of the agreement—that the agreement itself was legalised. The appellants urge strongly that this gave no effect to the words "if any," and that due effect can only

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be given to these by making the assumption that in certain circumstances no such rights or privileges could be enjoyed by the corporation, and this assumption can, they urge, only be satisfied by regarding the grant as one to take effect if the existing grants were void; but, if assumptions are to be made for which there is no warrant in the facts, it would be just as reasonable to assume that the period of the existing grant might cover, or be extended so as to cover, the whole period of thirty years, and in that case the words "if any" would have just as sensible a meaning as on the other hypothesis. In truth, the words are often needlessly used by way of caution, and it would be unreasonable to give them such weight as to destroy the obvious meaning of the statute or document in which they are contained.

The view expressed by their Lordships was that taken by the Railway Board, and in the result by the Supreme Court; but their Lordships think the appellants were right in urging that the judgment of the Supreme Court did not depend upon any independent investigation of the matter, but that they regarded themselves as bound by a judgment of this Board in a dispute which related to the rights over a portion of Queen street where a similar question arose, in the case of *Toronto R. W. Co. v. Toronto Corporation*, [1906] A.C. 117. In forming this view, their Lordships think, the Supreme Court were in error. The judgment referred to did not proceed upon this basis, but upon a ground entirely independent of whether the grant were made subject to the rights over Queen street or no.

It is unfortunate that, in these circumstances, their Lordships have not the advantage of the considered opinion of the Judges of the Supreme Court in this case; but the judgment of the then Court of Appeal in the case of *City of Toronto v. Toronto R. W. Co.* (1905), 5 O.W.R. 130, is quite clear upon the kindred question which arises with regard to the portion of Queen street, and with that judgment their Lordships are in entire agreement.

Throughout this judgment reference has only been made to the Yonge street area, for the question of principle which governs the one governs the other also, and there is no need for separate consideration of the second street.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

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GRAND TRUNK R.W. CO. v. SARNIA STREET R.W. CO.

Railway—Crossing by Street Railway—Order of Board of Railway Commissioners for Canada—Construction of Diamond by Street Railway Company—Liability for Maintenance—Derailment of Train—Failure to Shew Negligence or Breach of Duty—Limitation of Actions—“Construction or Operation of the Railway”—Dominion Railway Act, sec. 306—Ontario Railway Act, sec. 265 (1).

The defendants, having applied to the Board of Railway Commissioners for Canada for authority to cross at grade the plaintiffs' tracks at a certain point, were, in June, 1904, permitted to do so, by an order of the Board, which directed that they (the defendants) should at their own expense provide a diamond for the crossing. In the same month the diamond was placed in position under competent supervision; it was carefully and efficiently built. In September, 1912, some cars of the plaintiffs passing over the diamond became derailed and were injured or destroyed; the plaintiffs brought this action to recover damages for the injury and destruction, charging that it was the defendants' duty to keep the diamond and all appliances in connection with the crossing in good repair, which they had failed to do, and had so caused the derailment and damage:—

Held, upon the evidence, that the derailment was not shewn to have been the result of want of maintenance or of negligence on the part of the defendants. *Seemle*, that the defendants were not, under the order of the Board, bound to maintain and repair the diamond.

Guelph and Goderich R.W. Co. v. Guelph Radial R.W. Co. (1906), 5 Can. Ry. Cas. 180, and *Grand Trunk R.W. Co. v. United Counties R.W. Co.* (1908), 7 Can. Ry. Cas. 294, distinguished.

Edmonton Street R.W. Co. v. Grand Trunk Pacific R.W. Co. (1912), 7 D.L.R. 888, referred to.

Held, also, that the action was for injury sustained by reason of the construction or operation of a railway, and the statutory provisions limiting the time for bringing an action applied; the action not having been brought within a year, the plaintiffs were barred: sec. 306 of the Dominion Railway Act, R.S.C. 1906, ch. 37, and sec. 265 (1) of the Ontario Railway Act, R.S.O. 1914, ch. 185.

Canadian Northern R.W. Co. v. Robinson, [1911] A.C. 739, distinguished.

ACTION to recover the cost of clearing the wreck of a train of the plaintiffs and repairing the damage to their tracks and rolling stock, alleged to have been incurred and caused by the negligence of the defendants in not maintaining the tracks at a crossing of the plaintiffs' lines by the defendants' lines, near Blackwell, in good working order, by reason of which the train was derailed.

The action was tried by KELLY, J., without a jury, at Sarnia. *W. C. Chisholm*, K.C., for the plaintiffs.

A. Weir and *A. J. McKinley*, for the defendants.

June 23. KELLY, J.:—About 3.30 p.m. on Saturday the 14th September, 1912, a train of 62 empty cars, most of them out of

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repair, was on its way from Blackwell westerly towards Point Edward, over tracks of the plaintiffs, the destination of the train being the car-shops at Fort Gratiot, in Michigan. For some time prior to that date, that portion of the plaintiffs' road was not in use for purposes other than storing cars—chiefly disabled cars—there being then 289 cars at this place, all of which but 30 were out of repair.

A short distance west of Blackwell, this line of track is crossed on the level by a line of track of the defendants, running at about right angles to the plaintiffs' tracks. At the diamond forming this crossing, the locomotive parted from the car to which it had been connected, and the engine-driver, who was looking in the direction of the cars, says he saw this car and the next seven cars derailed. Seven of the eight cars passed over the diamond, and were thrown some to the right and some to the left of the tracks, and damaged, four of them being destroyed. No other witness but the engine-driver saw the accident.

The plaintiffs, on the 23rd December, 1914, brought this action to recover the cost of clearing the wreck and repairing the damage to their tracks and rolling stock, charging that it was the duty of the defendants to maintain the diamond and all other appliances in connection with the crossing in proper repair to permit them to operate their trains in safety, and that the derailment and the consequent damage were due to the defendants' negligence in not maintaining the crossing in good working order.

The plaintiffs' is the senior road at that point. An application of the defendants, on the 17th June, 1904, to the Board of Railway Commissioners for Canada, for authority to cross at grade the plaintiffs' line of tracks, was granted, and the Board directed that the diamond required for the crossing, together with all other appliances to be placed on the right of way of the plaintiffs, should be procured and provided on the ground by and at the expense of the applicant company, "the work of installing same to be done under the supervision of an engineer of the Grand Trunk, subject to the approval of the engineer of the Board; and that for the insertion of the diamond in the tracks of the Grand Trunk at the point of crossing, the applicant company shall cut the said tracks to a depth necessary to allow the flanges of the wheels on their rolling stock to pass, but not to any greater

depth, nor to a depth sufficient at any time to break or sever the rails of the Grand Trunk." In the same month, the diamond was placed in position under competent supervision, the uncontradicted evidence being that it was carefully and efficiently built.

The plaintiffs' contention is, that the cause of the derailment and the wreck was the defective condition of the diamond, the only thing pointed to in the evidence as a defect being what was described as a flaw in the rail of the plaintiffs' track, forming part of the diamond and below the groove cut in its rail, which was observed on examination of a piece of the rail some time after the accident happened. The defendants' roadmaster, Miller, a man of many years' experience, had made a minute examination of the diamond on the morning of Friday the 13th September, and saw no flaw or defect. The spikes and ties at the diamond were then in good condition, and the fish-plates properly and tightly bolted up. He says he then saw nothing that could cause the accident; and, prior to the accident, he heard no complaint about the condition of the diamond or that there was anything wrong with it.

His evidence is supported by that of Holt, who was also in the defendants' employ, and whose duties were along the track under Miller. He had examined the diamond within two or three days before the accident, and he says that the spikes and bolts were then proper and tight, and he saw no flaw or defect. He also says that at this point they (referring to the defendants' trackmen) took more care than elsewhere.

In connection with this is the important evidence of Wadland, who has had a railway experience of thirty years, twenty-six of which was in the plaintiffs' track department, for twenty-two years of which he was foreman, that, even if a flaw existed in the "neck" of the rail, as is alleged, that would not, in his opinion, cause the derailment, if the rails were braced up with the fish-plates.

The chief damage to the track was in the diamond itself and to the west of it. There was little damage east of it; but to the west it was found after the accident that one of the rails had been turned over. This, according to the evidence of Reid, foreman of the plaintiffs' car department, resulted from the derail-

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ment of the west truck of the seventh car. He did not arrive at the scene of the accident until about 5.30 p.m., and he does not explain how he reached this conclusion. After making an examination of the wreck and its surroundings, he reported to the plaintiffs the bad condition of the track, which, he says, might mean rotten ties, broken rails, or anything in connection with the track; and that, when he used the expression, it covered broken rails and rotten ties—that there were rails broken and ties rotten—but he makes no specific reference, in his evidence, to the flaw alleged to have been in the rail.

The plaintiffs contend that, following the order of the Board of Railway Commissioners, the defendants were under obligation not only to provide and construct at their expense the diamond, but also to maintain it, and that in the events that happened there was a failure to comply with the terms of the order and to follow the policy of the Board in such cases, not only as to construction but as to maintenance.

Guelph and Goderich R. W. Co. v. Guelph Radial R. W. Co. (1906), 5 Can. Ry. Cas. 180, is referred to. That case, however, is distinguishable from the present; there was there an express intimation that the applicant (the junior company) should bear the expense not only of construction but of maintenance. In *Grand Trunk R. W. Co. v. United Counties R. W. Co.* (1908), 7 Can. Ry. Cas. 294, there was also an agreement by which the defendants were permitted to cross the track of the plaintiffs, the entire expense of making and protecting the crossing to be borne by the former. The issue involved in that case was whether the plaintiffs, having under their charter the right to construct one or more sets of tracks, became the senior company, not only when their line was crossed by the line of a junior company, but also in respect of the crossing of any additional tracks subsequently laid by them. The decision of the Board was that the junior company should bear the expense of making and protecting all such crossings as new tracks were laid by the senior company. The agreement between the companies provided for "making and protecting" the crossing at the entire expense of the defendant company, and the judgment of the Board was given with that agreement in view. Protection does not necessarily mean or include maintenance or repairs; and the decision, in my opinion, does not meet the present case.

In *Edmonton Street R. W. Co. v. Grand Trunk Pacific R. W. Co.* (1912), 7 D.L.R. 888, the Assistant Chief Commissioner of the Board of Railway Commissioners stated what was the Board's established practice with reference to construction and maintenance both of the crossing and of protective devices which may be ordered. That declaration was made in August, 1912, subsequent to the making of the order of the 17th June, 1912, now under consideration; and, if it were shewn that that was the policy of the Board at the time this order was made, that might, notwithstanding the terms of the order, impose obligations not therein expressly set out. But it is unnecessary to discuss the effect of the Board's policy so declared, in view of the conclusion I have reached after a careful consideration of the whole evidence.

The plaintiffs have assumed the onus of establishing that the derailment resulted from defect or want of proper condition due to the defendants not maintaining the diamond crossing in good working order. It is sufficiently established that the alleged defect or want of condition in the diamond—the flaw in the rail—which had not come to the knowledge of the defendants or any person representing them, prior to the accident, if indeed it existed, would not have caused the derailment if the fish-plates were, as they are proven to have been a short time before the accident, in proper order and tightly bolted. There is no evidence that their condition was otherwise at the time of the accident.

I am not put to the necessity of finding other causes of the accident, since it has not, as I find, been proven to have been the result of want of maintenance or of negligence on the part of the defendants. With the condition of the plaintiffs' tracks to the east and to the west of the diamond, the use of the tracks being almost exclusively confined to the moving of damaged cars to and from the place of storage, and with the weakened state of many damaged cars making up the train, it could as readily be assumed that the accident resulted from any of these conditions as from any defect in the diamond crossing.

The plaintiffs have not established their case. Even had they done so, they would still be confronted with a difficulty in regard to the delay in bringing action. The statutory requirements are that all actions for indemnity or for any damages or injury sustained by reason of the construction or operation of a railway

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shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year after the doing or committing of such damage ceases and not afterwards.* This accident happened on the 14th September, 1912; the action was commenced on the 23rd December, 1914. The plaintiffs' counsel contends that the statutory provision has no application to the present case—that it refers to acts of commission only—and he refers to *Canadian Northern R. W. Co. v. Robinson*, [1911] A.C. 739, where (p. 745), in discussing the effect of this statutory limitation on the time for commencing action, it is said that it is confined to damage or injury sustained by reason of the construction or operation of the railway, and does not apply to a case of refusing or discontinuing facilities such as the Judicial Committee then had under consideration, and which the Committee held was not an act done in the operation of the railway. What the Committee was there dealing with was the railway company's discontinuance of a spur-track or siding into the plaintiff's yard outside of the railway as constructed, and for which the plaintiff sought damages. The present case is not one of that kind; and I am of opinion that the provisions limiting the time for bringing action apply to the circumstances now before me; and, for that reason as well, the plaintiffs are without a remedy.

The action will be dismissed with costs.

*See the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 306, and the Ontario Railway Act, R.S.O. 1914, ch. 185, sec. 265 (1).

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RE DARTNELL.

Distribution of Estates—Real and Personal Property in Ontario and in Foreign State—Wills Act, R.S.O. 1914, ch. 120, sec. 20 (3)—Letters of Administration with Will Annexed—Grant by Ontario Court—Foreign Domicile at Time of Death—Will Made in Ontario by British Subject—Distribution according to Law of Succession of Country of Domicile.

The testatrix died in 1915; she then was resident in the State of New Jersey. She left a will made in Ontario in 1880; she was then a British subject. At her death, she owned real and personal property in Ontario and also in New Jersey. Upon an application to a Surrogate Court in Ontario by a trust company for a grant of letters of administration with the will annexed, a contestation arose, and the Judge of the Surrogate Court found that the will had been duly made and executed according to the law of Ontario, and that at the date of the execution of the will the testatrix was a British subject within Ontario. Letters of administration were accordingly granted to the trust company, and there was no appeal from the decision of the Surrogate Court:—

Held, upon an application by the administrators for advice, that the Surrogate Court Judge had power to grant letters of administration or letters probate, irrespective of the question of domicile: Wills Act, R.S.O. 1914, ch. 120, sec. 20 (3).

History of the legislation and review of the authorities.

Held, however, that the will, though duly executed and free from defect in form, might be open to attack, either because the testatrix was, according to the law of the domicile, incapable of making a will, or because the will contravened the law of the domicile.

The letters granted in this jurisdiction should be regarded by the Court of another jurisdiction as conclusive, *quoad* form.

If the testatrix had, at the time of her death, acquired a domicile in New Jersey, the estate, real and personal, vested in the applicants as trustees, was to be administered having regard to the rules of succession in New Jersey.

An application by the Toronto General Trusts Corporation, administrators with the will annexed of the estate of Florence Dartnell, deceased, under Rule 600, for an order directing the applicants to distribute the estate in accordance with the will or for such other order as might seem just.

June 22. The application was heard by BOYD, C., in the Weekly Court at Toronto.

R. L. Defries, for the applicants.

H. J. Scott, K.C., for the beneficiaries under the will.

G. W. Mason, for a half-sister of the deceased.

June 24. BOYD, C.:—The deceased testatrix was, when the will was made in Toronto in April, 1880, a British subject: at her death in January, 1915, she was resident in Teralty, in the State of New Jersey, U.S.A.

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She left all her property, real and personal, to two aunts, who survived other beneficiaries designated in the will, and she had acquired both realty and personalty in Ontario, as well as in New Jersey, which is embraced in the will.

The executors named having predeceased the testatrix, application was duly made by the trust company, at the instance of the beneficiaries, for administration with the will annexed. A half-sister filed in the Surrogate office of the County of York, a caveat to the granting of probate, alleging that the deceased was domiciled in New Jersey at the time of her death, and that all proceedings relating to the administration of her estate should be governed by the laws of her last domicile, and that the will was not properly made or attested according to the laws of Ontario. Upon this contestation, the Surrogate Judge found that the will had been duly made and executed according to the law of the Province, and that at the date of the execution of the will she was a British subject within Ontario. He also ruled that the question of her domicile at the date of her death was not a matter that affected the granting of probate in this jurisdiction. That judgment, of the 2nd October, 1915, was not appealed from, is in force, and upon that letters of administration with the will annexed have been granted to the applicants.

On the 5th November, 1915, the solicitors of Beatrice Saunders, the half-sister, wrote a letter to the trust company setting forth the claim of their client that, notwithstanding the grant of probate, the distribution of the personalty should be according to the law of New Jersey. Hence this application for advice.

The Surrogate Judge intimated that, under the Wills Act, R.S.O. 1914, ch. 120, sec. 20(3),* he had the power to grant probate irrespective of the question of domicile, and that is a correct conclusion, so far as probate goes. All that the Surrogate has to do, in dealing with a will made in Ontario, is to consider whether (1) the will was made in proper form, as prescribed by the law of the place where it is made; and (2) whether the person was a British subject at the time of the making of the will. By virtue of the statute cited, the question of domicile is "immaterial." That is the word used in Flood on Wills (1877), p. 245.

*No will shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Our section 20 has been taken by instalments from the Imperial Act 24 & 25 Vict. ch. 114. Sub-section (1) was brought into Ontario in 1902 by 2 Edw. VII. ch. 18, and sub-sec. (2) in 1910 by 10 Edw. VII. ch. 57, sec. 20, which explains our sec. 20 (5), by which the former provision applies to persons dying after the 17th March, 1902, and the latter to persons dying after the 19th March, 1910. The Act has reference only to personal estate, and has really a more limited scope than one would at first suppose from a perusal of its provisions. It was passed in England to obviate difficulties which arose from the previous decision of Sir H. J. Fust that a person in order to make a valid will must conform to the law of the country where he is domiciled: *Craigie v. Lewin* (1843), 3 Curt. Ecc. R. 435. To simplify this point, the Act known as Lord Kingsdown's Act was passed in 1861.

Neither the English legislation nor our own was intended to displace the general law recognised in all civilised nations, condensed in the words *mobilia sequuntur personam*, which mean that personal property is subject to the law which governs the person of the owner. If he dies, it is not the law of the country in which the property happens to be, but the law of the country of his then domicile, which governs. Lord Selborne in *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461, 466, shews that "domicile is allowed in England to have the same influence as in other countries in determining the succession of movable estate." The Latin maxim embodies the law of the civilised world, and is founded on the nature of things. The Courts have regard to it, not by any special law of England, but by the deference which, for the sake of international comity, the law of England pays to the law of the civilised world generally.

It was said in the argument that no case could be found as to the effect of Lord Kingsdown's Act. But the scope of the Act was considered by Buckley, J., in 1905, and his opinion was, that the effect of the legislation was to say in substance "that the will shall be valid for the purpose of being admitted to probate, and will then take its place and be effectual for such purposes following on probate as the law of England allows." A succinct and admirable way of putting it, if I may be allowed to say so: *In re Grassi*, [1905] 1 Ch. 584, at p. 592.

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Again, Lord Selborne says in *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, 502, as cited by Stirling J., in *In re Trufort* (1887), 36 Ch. D. 600, 610: "So far as relates to domicile, it has always appeared to me to be clear, that the domicile of a deceased testator or intestate cannot, in principle, furnish any governing or necessary rule, except for the purpose of determining the succession to movable estate: For that purpose, recourse must be had, not always or necessarily, to the Courts, but always and necessarily to the law of the domicile." And Mr. Justice Stirling (at p. 610) quotes further the language of Lord Cranworth in *Enohin v. Wylie* (1862), 10 H.L.C. 1, 13, in these words: "The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicile."

I do not follow the cases any further save to quote the emphatic approval of Cozens-Hardy, M.R., to the statement of the law by the Judges above quoted, in the late case of *In re Bonnefoi*, [1912] P. 233, 237.

After consulting many other authorities which need not be specifically cited, I have reached the conclusion that the law applicable to the present application is subject to certain assumptions rightly stated in Dicey on Domicile, 2nd ed. (1908), p. 678. This present will, though it must be held conclusively as one duly executed and free from any defect in form, may still be open to attack, either because the testatrix was, according to the law of the domicile, incapable of making a will, or because the will is materially invalidated or inoperative as containing provisions contravening the law of the domicile.

The probate formally and solemnly granted in this jurisdiction should be regarded, *quoad* form, as conclusive, by the Courts of another jurisdiction; and in the present case there is no suggestion that there was any incapacity in or duress exercised over the testatrix; nor was it suggested that the dispositions made in the will were contrary to the law which obtains in the State of New Jersey.

The two aunts are the universal legatees; and, unless it is made manifest that the law of New Jersey forbids such disposal, and that that law forbids the exclusion of half-brothers and half-sisters of the testatrix, there seems no reason for apprehension

that the expressed wishes of the testatrix may not be safely carried out by the administrators. But that is for them as trustees to consider. I have been assuming that the domicile of the testatrix was in truth and in fact changed after the making of the will and before her death. This has not been judicially passed upon; and, as Lord Eldon said in a similar state of affairs in *Thornton v. Curling* (1824), 8 Sim. 310, 315—a case which still seems of authority despite the change made by Lord Kingsdown's Act—"What constitutes a man's domicile at his death, and, supposing it to be established that he was domiciled in a foreign country, what is the effect of his will having regard to the law of that country, are questions much too difficult and important to be decided on a motion."

The question of domicile is one resting mainly on facts; the question of the succession of movables in New Jersey is one of law; and I should think that the administrators can easily, by means of experts, ascertain what that law is, and act accordingly: *In re Moses*, [1908] 2 Ch. 235.

There will have to be ancillary letters of administration as to the personal property in New Jersey (if it is worth while in amount), and then any suggested or apprehended difficulties may disappear, as to the succession to the personal property.

All I can now say is, that the estate, real and personal, is vested in the applicants as trustees, to be administered having regard to the rules of succession in New Jersey, if it appears that the testatrix had acquired a domicile there at the time of her death.

Costs out of the estate.

If the beneficiaries under the will are in need, I think the opponents to this motion should consent to a substantial sum being paid out for their use, pending the final distribution of the estate.

[Permission was afterwards given to the applicants to bring an action to determine any moot questions raised as to the foreign assets.]

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June 24.

COCKBURN V. TRUSTS AND GUARANTEE CO.

Master and Servant—Contract of Hiring—Breach—Damages—Salary for Unexpired Portion of Term of Hiring—Mitigation according to Chances of Obtaining Employment—Profits of Business Venture—Guaranty.

The damages to be recovered by servant against master for breach of the contract of hiring are to be compensation for the actual loss sustained by the breach. Where the servant does not seek new employment, his failure to do so does not deprive him of his rights; the jury or Court must mitigate the damages by estimating his chance of having obtained employment if he had sought it; and the same principle applies where the servant does not choose to remain in idleness, but undertakes an entirely different occupation, or enters upon business for himself.

Review of the authorities.

The plaintiff had a contract with a company dealing in linens for employment as sales-manager, for five years, at an annual salary of \$5,000, guaranteed by a person since deceased; the company went into liquidation at a time when the plaintiff's contract had yet two years to run; and it was *held*, in an action upon the guaranty, brought against the administrators of the deceased's estate, and tried without a jury, that the damages should be assessed without regard to the profits made by the plaintiff upon a commercial venture in which he embarked his capital after his employment ceased; and the damages, mitigated upon an estimate of his chance of having obtained employment if he had sought it, were fixed at \$4,000.

ACTION upon a guaranty.

June 23. The action was tried by MIDDLETON, J., without a jury, at Toronto.

Hamilton Cassels, K.C., for the plaintiff.

Sir George C. Gibbons, K.C., for the defendants.

June 24. MIDDLETON, J.:—The plaintiff was employed under a written agreement dated the 20th December, 1910, by the Dominion Linen Manufacturing Company Limited, as their general sales-manager, for the period of five years from the 1st January, 1911, at an annual salary of \$5,000. The payment of this salary was guaranteed by Christopher Kloefer and Robert Dodds. The company went into liquidation at the end of December, 1913, while the contract had yet two years to run. The defendants are the administrators of the estate of Christian Kloefer, now deceased.

The plaintiff's right to recover is not disputed; the sole question is, what damages, if any, he is entitled to receive.

It appears that, in the course of the liquidation of the linen company, the plaintiff purchased certain of the assets of the

company at a price of about \$36,000, and that he was able to sell these assets in a comparatively short time by retail, so as to realise a profit of approximately \$11,000. After this, he became a member of a syndicate which purchased the plant and factory premises of the linen company, and turned them over to a joint stock company, in which he purchased shares. He then became the sales-agent for the new company, upon a commission basis; but, unfortunately, owing to business depression and other circumstances, his expenses as sales-agent exceeded his receipts from commission.

It is argued for the defendants that, under these circumstances, the plaintiff is not entitled to recover damages, for the profits made upon his first venture, occupying less than three months, brought him a sum in excess of the salary he would receive during the two years yet to run of his contract; and further that, not having sought employment but having entered into business on his own account, he has precluded himself from recovering.

No English case has been cited dealing with the precise matter, but I think the principles laid down in many English cases indicate that the defence suggested is untenable.

Reliance is placed upon the statement found in Labatt's Master and Servant, 2nd ed., vol. 1, p. 1181, where it is said that "where the servant has entered into an independent business on his own account before the expiration of the stipulated term, the damages should be reduced by the amount of the profits derived therefrom."

This ignores the fact that the profits derived from a business conducted by the servant are derived from something essentially different from that which he undertook to perform under his contract. In managing a business of his own he imperils his own capital and subjects himself to the responsibility and anxiety incident to the conduct of the business—things which are quite different from that which under his contract of employment he was obliged to render to the master.

The true principle to be derived from all the authorities is that explained in Macdonell's Law of Master and Servant, 2nd ed., p. 157, *et seq.* The damages are to be compensation for the actual loss sustained by the breach of contract. The servant on his part is not entitled to remain idle; he must make reasonable exertion and shew diligence in endeavouring to procure

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employment. The amount of wages which he would earn is not the measure of damages, but his probable loss; that is, the difference between the stipulated wages and the wages which he might reasonably be expected to earn by the exercise of ordinary diligence and exertion to obtain similar employment in which he would be called upon to render substantially similar services.

The fact that the servant is not bound to wait until the expiry of the term, but may at once sue for the damage sustained, and then call upon the Court to estimate his probable loss, upon the basis which I have indicated, goes to shew that any extraordinary profit which he may earn as the result of any business or speculation which he may undertake before the term has expired cannot be considered.

None of the cases cited by Mr. Labatt appear satisfactorily to apprehend the principle to be derived from the numerous English authorities. On the other hand, that principle seems to be clear and free from ambiguity. It is, that the damages are mitigated by the possibility of the discharged servant obtaining employment of equal or approximately equal value to that which he has lost. It is so put, for example, by Lord Esher in *Reid v. Explosives Co. Limited* (1887), 19 Q.B.D. 264, 267: "If from the time when the employment ceased onwards for a period equal to the time agreed on for notice of dismissal, he has had employment of equal value to that which he has lost, he has sustained no damage."

So also in *Brace v. Calder*, [1895] 2 Q.B. 253. A partnership was dissolved, the employee dismissed; but a new firm was formed which took over the business and offered a similar position to the employee. He could recover nominal damages only, for he had sustained no reasonable damage, by reason of the proffered employment.

In *Beckham v. Drake* (1849), 2 H.L.C. 579, 606, 607, Erle, J., said: "When a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment."

In *Hartland v. General Exchange Bank* (1866), 14 L.T.R. 863, Willes, J., instructed the jury that they were not to give the whole salary of a discharged bank manager, but "must reduce the amount by the probabilities of the plaintiff having other employment to fill up his time during that period. No

doubt the position of manager of a bank was not to be got every day, and that they would consider. Still, they would also consider what might reasonably be deemed the value of his time."

In *Sowdon v. Mills* (1861), 30 L.J.Q.B. 175, Blackburn, J., *arguendo*, says: "If an action is brought by a servant for a wrongful dismissal soon after the dismissal, the Judge tells the jury they must speculate on the chance of his getting a new place and base their damages on that. If the action is delayed till the man has got a place, what was matter of speculation before becomes certainty then, and the jury calculate accordingly."

In *McKean v. Cowley* (1863), 7 L.T.R. 828, Bramwell, B., and Wilde, B., in a case in which no employment was obtained, did not allow the full wages, thinking there "should be set something for the saving of his time and labour by his not having had to earn it."

Where the servant does not seek new employment, his failure to do so does not deprive him of his rights, but the Court must mitigate the damages by estimating his chance of having obtained employment if he had sought it; and the same principle, I think, applies where the servant does not choose to remain in idleness, but undertakes an entirely different occupation, or enters upon business for himself.

Applying this principle to the case in hand, it is quite plain that it would not have been easy, and that perhaps it would have been impossible, for Mr. Cockburn to obtain as good a position as that which he lost. He was a specialist in the selling of linens. The only other linen factory in Ontario was a comparatively small institution. The employment he entered into, like his speculation, was something entirely different from that which he was called upon to undertake to mitigate the damages.

There would have been considerable delay before he could expect to obtain such a position as he was called upon to accept, and I am satisfied that he would not have been able to obtain a position where he would be called upon to perform services that could fairly be compared with services that he had to render under the contract in question, at anything like the same salary.

Having regard to all the considerations that the cases I have cited, or any others I have been able to find, indicate ought to be borne in mind, I think the damages should be assessed at \$4,000.

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[BOYD, C.]

June 26.

DIEBEL V. STRATFORD IMPROVEMENT CO.

Company—Powers of—Contract—Guaranty—"Advances"—Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 23 (1) (k)—Amending Act, 6 Geo. V. ch. 35, sec. 6—Extension of Corporate Powers.

The plaintiff sued upon a contract by which the defendant company guaranteed payment for work done by him in erecting a factory upon the company's land. The work was begun under an earlier contract between the plaintiff and one T., who had an "option" for the purchase of the land from the company, and who appeared to be in reality only the agent of the company, to whose advantage it was to have the factory erected in order to improve their chances of selling other lands in the same tract:—*Held*, that the company were liable to the plaintiff either as the real contractors with the plaintiff or as guarantors; and, assuming that the contract was strictly one of guaranty, it was not *ultra vires* of the company, a corporation created under the Ontario Companies Act, R.S.O. 1914, ch. 178; T. was a person having dealings with the company, and the company had power to guarantee the performance of his contract with the plaintiff in respect of the factory: sec. 23, sub-sec. 1 (k). "Advances" made by the company (as recited in the contract) were either loans to T. or payments to the plaintiff.

Discussion of the meaning of "advances."

The last amendment of the Companies Act, by 6 Geo. V. ch. 35, sec. 6, adding sec. 210, appears to confer complete corporate autonomy on statutory incorporated companies and to put them on the footing of Crown-chartered companies with unrestricted corporate capacity.

APPEAL by the plaintiff from the report of BARRON, Co.C.J. of Perth, to whom the action was referred under sec. 65 of the Judicature Act. The action was upon a sealed guaranty.

June 22. The appeal was heard by BOYD, C., in the Weekly Court at Toronto.

R. S. Robertson, for the plaintiff.

F. H. Thompson, K.C., for the defendant company.

R. T. Harding, for the defendant Johnston.

June 26. BOYD, C.:—The relations between Tolton and the company-defendant are pretty fully set out in the reasons of His Honour Judge Barron, to whom this action was referred under sec. 65 of the Judicature Act, from which, after giving some material dates, I will quote.

Agreement between Tolton and Diebel (plaintiff) that the latter would erect a factory on a tract of land owned by the defendant company, for \$12,500, made on the 5th February, 1914.

On the 19th January, 1914, an option was obtained by Tolton for the purchase of a tract of the land held by the defendant company,

part of which was to be the site of the factory; this option expired by effluxion of time on the 16th April, 1914. The president of the defendant company says that it has been enlarged by verbal agreement, and is still open; the learned Referee, that Tolton has no notion of taking it up. Tolton is not before the Court in this action. Dissatisfaction having arisen, the first agreement was superseded by the agreement now sued upon, of date the 19th October, 1914, and action brought thereon on the 11th February, 1916.

Tolton contracted for putting up the building as one representing the Stratford Industrial Sites Limited, a concern promoted by the president of the defendant company, which had been incorporated in 1903, and had acquired the tract of land. This Industrial Sites concern was intended to be utilised in the sale of the lots laid out on the large tract—but it came to nothing. Prior to the option, Tolton was active in selling and endeavouring to sell lots for the company, for which he was paid on a commission basis, and in the course of these operations sought out the plaintiff, and so the first agreement arose. The improvement of the property by building upon it was to promote sales of lots on adjoining and other parts of the defendants' property. The company-defendant was "anxious and desirous of speedy completion and successful operation of the factory because they saw in it a means for more ready sale of the lots."

By the first agreement Tolton engaged himself to advance money in certain proportions as the building progressed; but the Referee finds that Tolton was quite unable to meet the responsibility, "and it was then generally supposed that behind it all was the financial responsibility of McPherson, the head of the defendant company."

After the prosecution of the building had gone forward to a stage where over \$2,500 had been paid out, and certain liens for unpaid materials had been filed, a new start was made to go on with the building under the agreement of guaranty by the company sued on, on the 19th October, 1914.

In taking the account of what is due thereunder, the Referee has given to Tolton the "credit of all payments made under the agreement by the defendant company, from whom in fact all moneys were really coming," and he reports the amount, not seriously disputed, to be \$4,024.

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The Referee reports that the 4th paragraph of the defence admits that the defendant company "were hoping and expecting to get the money wherewith to make the payments on the building for and on behalf of Tolton out of and from the sales of the lots."

The importance of the first inartificial agreement of the 5th February is that it indicates that Tolton was not really the contracting party on the land side, but that he represented a company to be formed for the purpose of locating sites on the land then used by the defendant company, and the president of the defendant company was the promoter of the intended company for whom Tolton was put forward to act. Tolton was a man of no substance, but was the working agent dealing with the land in the interest of the owners. It is also to be inferred from the first agreement that the site on which the building was to be erected should be worked by him and become his property—and this has been in fact carried out by a conveyance.

This is made plain by the recitals and other parts of the second and formal agreement of the 19th October, 1914.

It is recited that the company had subdivided the lands "and desiring to promote the sale of lots . . . arrangements were entered into for the erection of a factory upon lot lettered M," wherein Diebel was to carry on certain lines of manufacture.

It is further recited that the company has advanced or procured to be advanced the sum of \$2,532, which has been used in connection with the erection of the factory, and certain materials have been provided, the payment of which has not been arranged for, and the work has been suspended, and that for the purpose of the carrying out to a completion of the aforesaid plans the agreement of guaranty was entered into. Then in and by the operative part Tolton agrees to advance and pay to Diebel \$8,460 to be used and employed in the erection and completion of the building.

The plaintiff agrees to pay out of the moneys advanced and paid by Tolton a claim of \$600 for which a lien had been lodged on the company's land. And for security to Diebel the company guarantee that Tolton will duly fulfil his obligations under the agreement, i.e., as to the payment and advance of moneys.

In the defence of the company these statements appear. Before the 19th January, 1914, when the option to purchase

was given to Tolton, he and the company had various conferences as to the terms of such purchase; and, in consequence of such conferences, Tolton opened up negotiations with Diebel for the erection of the factory (paras. 2 and 3); and, when the option was given, the company knew of Tolton having entered into a contract with the plaintiff as to the factory. If this is correct, the dates do not shew the correct order of events. By para. 4, Tolton expected to get the money to pay the plaintiff out of sales of the lands to be purchased for the company, and the company was aware of this contract, and was always ready and willing to assist Tolton in carrying out his contract with Diebel. By para. 5, the defendants advanced to the plaintiff, per the said Tolton, the sum of \$2,532 to assist in the erection thereof, but the plaintiff failed to pay for material prior to the agreement of the 19th October, and liens were registered against the factory.

I incline to think that Tolton was no more a substantial party in the second contract than he was in the first. He then represented a shadowy company, and in the outcome his agency was employed to represent a substantial company, the owner of the lands and the party chiefly interested in the whole undertaking. The option was a mere *dévice*, I should say, to give Tolton an ostensible footing and to keep the company from being too much in the lime-light as booming its own property. In that view, the question of guaranty does not arise; we can see through the written contract to the substance underneath, and regard the company as the real and substantial contractor with Diebel, and so liable to pay him the amount of his outlay and work as found by the report. There appears to be no defence on the merits—no one thought of the guaranty being *ultra vires*—the original pleadings were framed on other lines, and only by way of late amendment is the unmeritorious defence under the statute set up.

Assuming that the contract is strictly one of guaranty, the question then is, does it transcend the powers possessed by the company? I would place the matter for discussion directly on the language of the Companies Act, which, it is admitted, is to be read into the charter of the company, though subsequently enacted: R.S.O. 1914, ch. 178, sec. 208. The particular clause I deal with is sec. 23, sub-sec. 1 (k): "A company shall possess as

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incidental and ancillary to the powers set out in the letters patent . . . power to . . . (k) lend money to customers and others having dealings with the company and guarantee the performance of contracts by any such persons."

Tolton was clearly a person having dealings with the company; and, if he was one who borrowed money from the company, the company would have incidental power to guarantee the performance of his contract with the plaintiff in respect of the factory. I do not consider whether it is essential that the wording should be in regard to the particular dealing which is the subject of guaranty; for here the dealing and negotiations and advancing of money were all centred on one transaction, i.e., the benefiting of the company and the enhancement of the property held by the company by facilitating the disposal of it profitably in the shape of building lots. In this aspect of the case, the company should not be allowed to recede from the letter of the engagement by which Tolton is put forward as the person who is to pay for the work done by the plaintiff. In fact, he does not pay, and the money which is paid to the plaintiff comes from the company. Before the guaranty was framed, the company "had advanced or procured to be advanced the sum of \$2,632, which had been used in connection with the erection of the factory" (see 3rd recital in guaranty).

What is the meaning of "advances . . . used" in connection with the building? The same system of advances was carried throughout, i.e., money derived from or paid by the company passed into the hands of the plaintiff. According to the terms of the contract, the proper method in form would have been to advance the money or lend the money to the person responsible for the payment, Tolton, and let him pay Diebel and discharge his contractual obligation.

Again, regarding Tolton in the light of an option-holder, the money advanced would be as a loan to Tolton, which would have had to be taken into account if the option were carried out.

Primâ facie the relation of borrower and lender existed as to these "advances" between the company and Tolton. On the writing the company could have sued and recovered the amounts from Tolton as money paid for his use and behoof.

In the Oxford Dictionary, *sub voce* "Advance," the 8th meaning is: "Payment beforehand or in anticipation: payment or

security of future re-imbursement. Hence a sum of money so furnished, a loan." In *Rose v. Hickey* (1878), 3 A.R. 309, 329, Patterson, J.A., says: "'Advance' . . . is a word usually employed to denote money paid which is to be repaid."

In brief, these advances by the company were either loans to Tolton or payments to the plaintiff; and, if the latter is the correct view, the company were paying on the first and on the second contract as principals. In either aspect, I cannot regard the question of *ultra vires* as fatal to recovery on the sealed instrument sued upon or for the amount found due by the report. The merits would appear to be with the plaintiff, and I would construe the statute liberally to carry out the legislative intent, which was also the intention of the parties, that the engagement of the company to pay should be a valid one.

I was asked to enlarge the time for appealing from the findings on facts of the learned Judge, if I should overrule him as to the statute, and this may be granted so that the company may be allowed to appeal during vacation, to be heard after vacation.

Other minor points were brought before me, which had been either not disposed of or overlooked on the reference:—

(1) The site of the factory was conveyed to the plaintiff by the defendant Johnston, in whose hand as trustee the conveyance had been placed; but, before getting it, the plaintiff was compelled to pay \$250 which Johnston claimed as commission from the company. The half of this amount is claimed by the plaintiff as a recoupment which the company should make, and I see no reason why this is not a valid claim. The Referee does not notice it.

(2) Another claim is \$100, representing costs as to a lien on the land. This arose from the failure of the company to supply funds, and it seems to me is proper, as the company is to convey free of incumbrances.

(3) Interest also should be given on the main amount from the date of the writ.

The appeal is allowed with costs and judgment to be entered for the plaintiff as above directed, with costs of action and reference.

Another point not discussed or adverted to before me, and which may be conclusive, is this.

By the last amendment of the Companies Act in 1916, 6 Geo.

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V. ch. 35, sec. 6, a section is added (210 (e)), giving to companies created as this was general corporate powers of almost unlimited range. Such a corporation, unless otherwise specially declared at its creation, shall be deemed from its creation to have had the general capacity which the common law ordinarily attaches to corporations created by charter.

In Palmer's Company Law, 8th ed., p. 3, is pointed out the fundamental difference in character between a chartered company and one incorporated under the Companies Acts. At common law a company created by the King's charter has power to deal with its property and to bind itself by contracts and to do all such acts as ordinary persons can do. This last enactment appears to confer complete corporate autonomy on the statutory incorporated companies and to put them on the footing of Crown-chartered companies with unrestricted corporate capacity. But, as this was not argued, I do not further dwell upon it. My brother Middleton called my attention to this new aspect of corporation law.

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[APPELLATE DIVISION.]

June 27.

LLOYD v. ROBERTSON.

Will—Action to Set aside—Want of Testamentary Capacity—Undue Influence—Evidence—Findings of Trial Judge—Reversal on Appeal—Costs.

Held, reversing the judgment of MEREDITH, C.J.C.P., 35 O.L.R. 264, that the plaintiff, upon the evidence, had failed to shew that the will of his father was procured by the defendant his brother, or that there was any lack of testamentary capacity in the father.

The defendants' appeal from the judgment was allowed with costs thereof to be paid by the plaintiff; the plaintiff's costs, as between party and party, up to and inclusive of the judgment, and the defendants' costs, as between solicitor and client, up to the same point, were ordered to be paid out of the estate.

Wilson v. Bassil, [1903] P. 239, followed.

AN appeal by the defendants from the judgment of MEREDITH, C.J.C.P., 35 O.L.R. 264.

April 18 and 19. The appeal came on for hearing before GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., when a question was raised as to parties (see 35 O.L.R. at p. 279, *sub fin.*)

After some argument by counsel, the Court directed that all proper parties should be added and a new trial had; the order not to issue for one month, to enable the parties to make such arrangements as they deemed best.

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June 1. The following consent, signed by counsel for the plaintiff and defendants, dated on the same day, was filed:—

“The parties hereto agree as follows:—

“1. No action or proceedings will be taken by the plaintiff to attack the will in question herein or any of the provisions thereof not affected by the judgment now in appeal.

“2. The appeal shall be argued on the present record without being referred back to add parties or for a new trial.”

June 1 and 2. The appeal was further heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley, K.C., and *J. J. Coughlin*, for the appellants, contended that they had satisfied the onus of proof resting upon them to shew that the writing propounded as the last will of John Lloyd was such in fact. The will could not in any sense be said to have been procured by the defendant Albert Lloyd.

Glyn Osler, for the plaintiff, respondent, on the question of onus, referred to *Fulton v. Andrew* (1875), L.R. 7 H.L. 448, 471. In any result, he contended, the plaintiff was entitled to costs.

June 27. The judgment of the Court was read by GARROW, J.A.:—Appeal by the defendants against the judgment of the learned Chief Justice of the Common Pleas at the trial before him without a jury, in favour of the plaintiff.

The action was brought by the plaintiff, a son of the late John Lloyd, to have the last will of his father, dated the 9th January, 1915, set aside, upon the grounds (1) that his father when he made the will had not testamentary capacity, and (2) that its execution was procured by the undue influence of the defendant Albert Lloyd and his family.

The testator, who had resided for many years at the city of Stratford, died on the 23rd May, 1915, aged seventy-four years. His wife predeceased him in the month of March, 1902. His heirs at law and next of kin were his two sons, the plaintiff and

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the defendant Albert Lloyd. The testator had for a number of years carried on a grocery business, which seems to have been fairly successful. He was assisted in the business by his son Albert, who remained at home, while the elder brother, the plaintiff, was never at home after his ninth year, when, under an agreement in the nature of an adoption, he went to reside with an uncle, who was childless. The defendant Albert, who had remained at home, was paid by his father a wage of \$7 per week from about the year 1887 until his marriage, when the wage was increased to \$8, and he also then received a gift of \$500. Later, the wage was again increased to \$10 per week, at which it remained until the year 1910, when the business, including the stock in trade—representing a value, it is said, of about \$7,000—and the premises were transferred to him by his father, under an agreement which included, among other things, the maintenance of the father and a right to continue to occupy a portion of the premises; an agreement which, so far as appears, has been performed by the son to the satisfaction of the father.

From the time of the making of the agreement, the father made his home practically in the back room of the shop, where for years before he had spent much of his time, and it was in that room that the will in question was executed. There is no justification in the evidence for the plaintiff's suggestion that the room was dirty or ill-kept, or that the life of the deceased was the life of a hermit shut away from the world.

The circumstances accompanying and under which the will was made, as given in the evidence, and regarding which, as the learned Chief Justice correctly says, there is really no serious dispute, are as follows:—

In the month of January, 1915, the deceased was ill with an attack of gangrene in the foot, for which an operation was considered necessary. He had also been diabetic for some time. The defendant saw him constantly, and knew that he was seriously ill.

On the 8th January, 1915, the defendant said to the father, "Were you thinking about making a will?" To which the father replied, "Well, yes, I guess I had better." The son then said, "Shall I send for Lawyer Robertson?" To which the father replied, "Yes." The son then telephoned to Mr. Robertson, who

came the same afternoon, took written instructions from the deceased (produced at the trial), returned to his office, prepared the will, attended next day with it, and had it executed. The witnesses to it are Mr. Robertson, the solicitor, and Dr. J. A. Robertson the father of Dr. Lorne Robertson, the testator's medical attendant at the time.

Mr. Robertson, the solicitor, is a well-known barrister, frequently appearing before this Court as counsel. The other witness, Dr. J. A. Robertson, is an equally well-known and eminent member of the medical profession. Both had known the deceased for many years, and Mr. Robertson, the solicitor, had acted for him in the previous transaction in 1910.

The will is very short and simple, contained on one foolscap sheet, typewritten, and, omitting purely formal parts, is as follows:—

"1. I revoke all wills at any time heretofore made.

"2. I direct that my just debts funeral and testamentary expenses be paid by my executors out of my estate.

"3. I give the following legacies: to my son Frank W. Lloyd the sum of one thousand dollars; to Maggie, the wife of my son Frank W. Lloyd, the sum of five hundred dollars; to Gordon, the son of my son Frank W. Lloyd, the sum of five hundred dollars; the same to be paid to his father for him in case he has not reached the age of twenty-one years; to my son Albert the sum of three thousand dollars; to Louie, the wife of my son Albert, the sum of one thousand dollars; to Luella, the daughter of my son Albert, the sum of one thousand dollars, the same to be paid to her father for her in case she shall not have reached the age of twenty-one years.

"4. The residue of my estate of whatsoever kind and wherever situate I give devise and bequeath to my son Albert Lloyd."

The learned Chief Justice, as expressed in his judgment, was of the opinion that the will had been procured by the defendant Albert, and that he had not satisfied the onus resting upon him to satisfy "the conscience of the Court that this paper writing in question is and contains in truth the last will of John Lloyd, deceased, and that is enough for the determination of the case adversely to these parties to this action who support the will." He said also: "If it were necessary to go further, my finding upon

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the whole evidence would be that it is not the last will of John Lloyd, that although it was the voice of John Lloyd that gave the instructions and spoke at the execution of the will it was the hand of his son Albert that pulled the strings controlling that voice."

These extracts, I think, fairly epitomise the findings in so far as they relate to the evidence.

There is no explicit finding that the testator was not of testamentary capacity.

I am, with deference, unable to agree with the conclusions of the learned Chief Justice. I even doubt whether, in any proper sense, the will can be said to have been "procured by the defendant" so as to render him subject to the special onus to which the learned Chief Justice refers. The one single thing that the defendant did in the way of "procuring" the will was to telephone for the solicitor after he had asked his father if he intended to make a will and if he should send for Lawyer Robertson, who had acted for them before. At that time, according to the evidence, not a word had been said about what the contents of the will were to be; and, in afterwards arranging what they should be, there is nothing to shew that even one suggestion came from the defendant Albert. On the contrary, the undisputed evidence is that before the solicitor arrived the testator stated to the defendant Albert how he proposed to dispose of his estate, and simply asked Albert if he was satisfied.

Under the circumstances, to do what the defendant Albert did was not, in my opinion, to "procure" a will to be made in his favour, in any proper or reasonable sense.

But, even if the defendant is subject to the other and heavier onus, as held by the learned Chief Justice, I think the burden has, upon the undisputed evidence, been fully and amply discharged.

The case must, of course, be determined upon the evidence and the reasonable and proper inferences to be drawn from all the surrounding circumstances, and the instrument should be maintained rather than destroyed.

A number of witnesses were examined. The only ones who had anything to do with the instructions for and the preparation and execution of the instrument were the defendant Albert and the two witnesses, all of whom were called and fully examined.

Mr. Robertson, the solicitor, deposed that when he came he was taken by the defendant Albert at once to the back room, where the testator was, and proceeded to obtain the necessary instructions. These from beginning to end were given by the testator himself without prompting or suggestion from the defendant Albert, although he was in the room most of the time, at the testator's express request. These instructions were taken down in pencil, and the memorandum was produced at the trial. It begins: "Owms \$7,000 all told." Then follow legacies to Frank and his family as in the will, the legacies to the defendant's wife and daughter as in the will, and "Albert \$3,000, also residue to him." And finally the names of Dr. J. A. Robertson and W. A. Moore as executors.

The selection of executors was entirely made by the testator, who requested that Dr. J. A. Robertson (no relation of the solicitor) should be present at the execution of the will.

Before commencing to give instructions for the will, the testator discussed with the solicitor the propriety of making a will at all, since the Courts so often interfered after a man was dead. He also referred to the trouble Frank (the plaintiff) had made about the mother's will, and suggested inserting a clause prohibiting a legatee from disputing the will, but was advised, since his will was so simple, not to do so, and finally consented.

It may be noted in passing that these are not the comments of a fool or an imbecile, but of an experienced, thoughtful man, which the evidence indicates the testator to have been.

Albert's presence in the room while instructions were being given is proved by the solicitor to have been wholly at the testator's request, as is also the fact that beyond being there he took absolutely no part, except in discussing the names of executors and to tell his father in answer to a question what the first name of his wife was.

Next day, the solicitor arrived with Dr. J. A. Robertson. They proceeded to the room where the testator was, and witnessed the due execution of the will, after it had been read over to him. The solicitor says: "The door was closed, and John Lloyd, the doctor (J. A. Robertson), and myself were there alone. I read the will over, and I asked Mr. Lloyd if he quite understood the document. He said he did. Then I asked him if it was according

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to his wishes. He said that was the way he wanted it. Then I went to the door and opened it and called Albert and asked him to get me a pen and ink, which he did. . . . These things were got and the will was signed. . . . I took the will with me."

"Q. You had previously done some business between the old man and Albert? A. I had in 1910 drawn the papers relating to the transfer of the business by the father to the son.

"Q. What was your opinion of his mental condition on both these occasions? (objected to). A. I know that John Lloyd thoroughly understood what he was doing. I have no hesitation in saying that on both occasions he quite understood, seeing that he gave me the instructions himself without interference from anybody, and that I went over it with him sufficiently to know that his instructions were precise.

"Q. (By his Lordship). Why did not you, when Dr. Robertson was there, ask him expressly about these different things (referring to the transaction of 1910). A. Of course the will was a very short, simple will. I would have thought it would have been an impertinence to ask an intelligent man like him."

The learned Chief Justice was apparently under the impression, which I regard as quite erroneous, that the solicitor was Albert's solicitor, and not the father's, simply because Albert had sent for him under the circumstances before stated. His Lordship again asks: "Q. Any independent advice? A. Unless mine and Dr. Robertson's was independent. Q. Well, could yours be called independent on this occasion? A. I came down at his request that I should come there, but I got no instructions from Albert. Q. You would not have been there except for Albert's message? A. I am not at all sure that somebody else's message would not have brought me."

When the transaction in 1910 occurred, the testator had also requested Dr. J. A. Robertson to be present, and he was present when the agreements were executed. He was evidently a gentleman in whom the testator had the utmost confidence.

Dr. Robertson had lived in the immediate vicinity of the testator for many years, and frequently saw him. He attended him professionally about four years before the making of the will for a temporary illness; and his firm, consisting of himself and his

son Lorne, were the medical advisers of the testator when the will was made.

"Q. You had known Mr. Lloyd for a great many years? A. Yes.

"Q. Had been a neighbour of his for a great many years? A. Yes; I suppose some twenty years.

"Q. Lived almost diagonally across from the store? A. Yes.

"Q. And saw him very frequently? A. Yes.

"Q. How was he as to his usual condition of health? A. Well, he seemed to be a very healthy, robust man physically, and I think would weigh two hundred or over two hundred.

"Q. Tall, erect? A. Yes, and stout. . . .

"Q. Did he not send for you in 1910 when he was making the arrangements with Albert about taking over the business? A. Yes.

"Q. Consulted with you? A. Did not consult with me; sent for me to go down and witness the agreement.

"Q. How was his mental condition at that time? A. Apparently; as far as I could see, all right.

"Q. Up to the time of the making of the will did you ever have any reason to suspect any impairment of his mental faculties? A. Not at all.

"Q. Never entered your head? A. No."

At the time the will was executed the testator said to this witness laughingly: "Now, Doctor, I prefer you to be my executor instead of Dr. Lorne, because you are an older man"—a remark certainly not prompted by the defendant Albert, and, again, a remark at variance with the imbecility suggested rather than proved by the plaintiff.

Dr. Lorne Robertson, the son of Dr. J. A. Robertson, who was the doctor actually in attendance upon the deceased, said that he had known him for many years, but had not seen much of him until recently. He explained that the testator suffered from gangrene of the toe and was diabetic, but that these diseases had not, so far as he could see, affected his mind, and that he answered questions perfectly sanely: "I saw no evidence of any hallucinations or delusions"—these having been suggested as probable, in the case of advanced diabetes, by Dr. English, an expert called by the plaintiff.

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In addition, there is much and important evidence given by a number of people who knew the deceased, commercial travellers, customers, the charwoman who did his room, the nurse who attended him in the hospital, all to the same effect, namely, that, as far as any one could see, the deceased was when he made the will in the possession of his usual intellectual vigour and understanding. His nephew, a clergyman, The Reverend Egerton Armstrong, who resides in Essex, called upon him after the operation had been determined upon, but before it had actually occurred, and had about ten minutes' conversation with him. He knew him well and had seen him at intervals of about two or three years for many years. They spoke of the proposed operation and of its wisdom, and about spiritual matters, "and he answered me very intelligently and satisfactorily."

"Q. Did he during the time you were with him exhibit any weakness of intellect? A. None at all."

The learned Chief Justice, who had apparently adopted the plaintiff's theory that the deceased was residing like a hermit in a dirty back room, either voluntarily or involuntarily, and perhaps, as propounded by the plaintiff's learned expert, because he had an hallucination of poverty, asked:—

"Q. Did you not remonstrate with him about living a lonely life of that character? A. No, I did not say anything to him about it that I can recollect.

"Q. Did you instruct him that it was a wise or unwise thing to do? A. Well, that is the room that he lived in most of his life for a long time.

"Q. When his wife was living? A. Yes . . . He spent most of his time in that room reading—

"Q. Not sleeping there? A. No.

"Q. Did it occur to you that it would be well for the man to have some human being—A. Well, he was always of a very retiring disposition, and he was a man fond of reading, a very intelligent man, and there are men who like that sort of life."

Against what appears in this evidence to be an overwhelming case in favour at least of a sound and disposing mind on the part of the deceased, there are but two items of so called evidence, both referred to in the judgment with apparent approval: one the opinion of the expert Dr. English, who had never seen the testator,

apparently based upon a theory that with diabetes you must or will have hallucinations; although there is the clearest proof in the evidence which I have quoted that there were in fact no hallucinations; the other that of the shop-assistant, called by the defendants, who, after stating that the deceased seemed to be very comfortable in his back room and well taken care of by the defendant and his wife, and that he had never noticed anything in the old man's conversation to indicate that there was anything wrong with his mind or that he had delusions of any kind, was asked in cross-examination:—

“Q. The latter time you were working there, he did not seem to do much about the store? A. No.

“Q. Did not seem to be wanting to do it? A. Yes.

“Q. Seemed to be getting old? A. Yes.

“Q. And seemed childish? A. Well yes, a little childish.”

He was not further examined, so we are left in ignorance of the circumstances, if any, on which the opinion that the testator was even a little childish was based.

The other branch seems to me to be also completely set at rest in the defendants' favour, if the evidence of the witnesses to the will is believed, and I know of no reason why it should not be. The only thing apparently opposed to it is suspicion and a suspicion that seems to involve, if well-founded, a species of conspiracy between the witnesses and the defendant, which, in the case at least of the witnesses, is of course absurd.

The learned Chief Justice refers more than once to the defendant Albert's "selfishness." That, however, with deference, seems to me to beg the question. The defendant cannot be fairly accused of selfishness if he obtained the larger share in his father's estate from a competent testator. He might even have received the whole without being greatly to be reproached. Although I do not regard it as of the highest importance, there are excellent reasons, in my opinion, why there should have been the inequality of which the plaintiff complains. The plaintiff had lived his own life away from home. He seems to have been content to see very little of his father and mother for many years. He had certainly done nothing towards earning and acquiring, or assisting his father to acquire, the property which the father had, whilst the defendant certainly did much. Until middle age, the defendant

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was working in the business on a small salary, while his father, who was even then fond of the back room and his pipe and book, gradually left matters more and more to the son; until, in the year 1910, the business, with its assets and its liabilities, was handed over to the son. And of the estate which was retained it is impossible to say how much of it the testator would have had if the defendant Albert had left him to his own resources, as the plaintiff did.

Under the circumstances, it seems to me a perfectly natural thing that the defendant Albert should have been preferred in the will—even if the old dispute over the mother's will had not been rankling in the testator's mind—as it probably was, from the evidence of Mr. Robertson, the solicitor.

My conclusions, therefore, are that the plaintiff's case has been completely met and answered at every point and that his action should have been dismissed.

Something is said in the judgment about the bequest of the residue to the defendant Albert. This, it is surmised, would interfere with a proposed attack by the plaintiff, who seems to be fond of attacks, upon the agreement made in 1910. And the judgment suggests that the clause was not included in the instructions and should be eliminated. It was, however, in the will which was read over and approved by the testator, and, what appears to me to be of even more importance, it is expressly mentioned in the pencilled instructions taken the day before. In my opinion, there is, under the circumstances, no good reason why the clause should not stand part of the will.

For these reasons, I am of the opinion that the appeal should be allowed and the action dismissed.

Upon the question of costs, in view of the judgment of the learned Chief Justice, it cannot be said that the plaintiff had no ground for taking action. The testator, while, as I have found, mentally his own master, was, when the will was made, by reason of his age and illness, physically dependent upon the defendant Albert. The plaintiff resided at a distance and knew nothing about the will in the father's lifetime. The defendant Albert propounded the will; and it is no real hardship upon him, therefore, that the circumstances concerning the making of it should have been scrutinised with care.

Altogether, the circumstances, in my opinion, would justify an order somewhat similar to that made in one of the cases referred to by the learned Chief Justice, *Wilson v. Bassil*, [1903] P. 239, namely, that the plaintiff's costs, as between party and party, up to and inclusive of the judgment, and the defendants' costs to the same point, as between solicitor and client, should be paid out of the estate, and that the plaintiff should pay the defendants' costs of the appeal.

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Appeal allowed.

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Division Courts—Action Improperly on List for Trial—Dismissal in Absence of both Parties—Order Setting aside Judgment—Powers of Judge—New Trial—Division Courts Act, secs. 79 (2), 104, 123, 226—Motion for Prohibition—Refusal—Appeal—Costs.

The order of KELLY, J., 36 O.L.R. 504, refusing without costs a motion for prohibition to a Division Court, was affirmed with costs in the appellate Court to the plaintiff, respondent.

Held, by MEREDITH, C.J.C.P., that there is no authority for giving judgment in favour of either party when neither is present; when a case comes on for trial and neither party appears, the case should be struck from the docket or adjourned. Where a judgment has been irregularly entered, the Judge has power, under secs. 104 and 226 of the Division Courts Act, to set it aside, and order a trial; but, where the case has not been tried, the trial ordered is not a new trial.

Per RIDDELL, J.:—The case was, against the express direction of the Division Courts Act, sec. 79 (2), placed on the list for trial; and it must be treated as though it was not there at all. The Judge had no power to try the case at that time—the statute is imperative. There having been no "trial" in law, there could not be a "new trial," and the time-limit in sec. 123 did not apply.

AN appeal by the defendants from the order of KELLY, J., in Chambers, 36 O.L.R. 504.

June 5. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. T. Walsh, for the appellants, argued that the Judge in the Division Court had no power to set aside the judgment and order a new trial after 14 days or at most 28 days had passed: Division Courts Act, sec. 123. See *Re Nilick v. Marks* (1900), 31 O.R. 677. The statute is imperative: *Mitchell v. Mulholland*

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(1877), 14 C.L.J. 55. Prohibition should be granted where, as here, judgment has been given without the notice required by sec. 79 of the Division Courts Act: *In re Forbes v. Michigan Central R.W. Co.* (1893), 20 A.R. 584.

C. H. Porter, for the plaintiff, respondent, contended that prohibition had been rightly refused. The Judge had power under secs. 104 and 226 of the Act to do as he did, even after the fourteen days had expired: *Fee v. McIlhargey* (1882), 9 P.R. 329; *Re North American Life Assurance Co. v. Collins* (1905), 9 O.L.R. 579; *Bicknell & Seager's Division Courts Act*, 3rd ed., p. 570.

June 28. MEREDITH, C.J.C.P.:—This appeal, in respect of a Division Court case in which less than \$20 was involved, has arisen out of a series of errors of procedure in that Court, for some of which errors every one concerned in such procedure is blamable.

The plaintiff brought his action in the wrong Division Court; the defendants objected; and that error was promptly cured by a transference of the case to the proper Division Court, under the provisions of sec. 79 of the Division Courts Act.

Due notice of the transfer of the case was given, by the Clerk of the Court to which the case was transferred, with notice of the sittings of the Court at which the action should be tried, as required by the provisions of that section of the Act.

The Clerk of the Court also notified the plaintiff that the payment of fees, amounting to \$1.60, was required in order that the case might be put upon the list of cases to be tried on the day named in the notice—the 27th May, 1915; but no notice of this was given to the defendants.

These costs were not paid; and no one appears to have attended the Court on the 27th May, 1915, for either of the parties.

By mistake, the Clerk of the Court entered the case in the docket of cases for trial at a sittings of the Court held on the 20th May, 1915: when, no one appearing for any of the parties, the presiding Judge directed that judgment be entered for the defendants, without costs.

In that the Judge, I have no doubt, erred: I know of no authority for the giving of judgment in favour of either party when neither is present; and there is nothing in any of the several pro-

visions of the Act respecting judgment by default, or otherwise, that gives any countenance to any such procedure. Section 99 provides for judgment against a defendant, in certain cases, without proof of the plaintiff's claim, but it contemplates the plaintiff being present, or represented, and seeking judgment.

The case should have been struck out of the docket; or adjourned until the next sittings of the Court.

This happened on the 20th day of May, 1915, yet no fault was found with the procedure by any one, nor was any offer made to pay the costs demanded, by the Clerk of the Court from the plaintiff, until nearly ten months afterwards.

On the 9th day of March, 1916, the plaintiff gave notice of a motion for an order setting aside the judgment for the defendants, directed to be entered, as I have mentioned, on the 20th day of May, 1915: and the Judge who made that direction heard this motion, and, upon it, on the 13th day of March, 1916, made a direction in these words: "On the ground of irregularity, new trial granted;" and the misuse of the words "new trial" has, I have no doubt, led to these proceedings, taken for the purpose of prohibiting a new trial, and so taken on the ground that there was no power to grant a new trial, at the most, after the lapse of 28 days following the trial: and it is, or should be, quite plain that, if this were a case of granting a new trial, this appeal ought to be allowed.

But it is not a case of a new trial; there has not been any trial of the case. It is a case of setting aside a judgment, irregularly directed to be entered, and providing for a trial of the case: and that the Judge, whose order in that respect is in question here, had power to do under secs. 104 and 226 of the Division Courts Act: and, he having that power, this appeal fails: we cannot concern ourselves with the question whether he should or should not have made the order which he did make, further than to say that he should not have called his action in the matter the granting of a new trial: see *Anlaby v. Prætorius* (1888), 20 Q.B.D. 764.

Under all these circumstances, especially the plaintiff's indifference to the due prosecution of his action, and dilatoriness in the payment of the fees demanded, Kelly, J., very properly, I think, dismissed the motion for prohibition without costs. It

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was only the defendants' neglect to attend on the day when the case should have been dealt with—the 27th May, 1915—which prevented a regular dismissal of the action, a dismissal which would be final if no application were made for a new trial within the prescribed time. But, though the plaintiff would have no good cause for complaint if he had lost his action altogether, the defendants ought to have been content with the order made below; and, not having been so content, but making an appeal in a pretty plain case, they ought to pay the costs of this appeal.

RIDDELL, J.:—The plaintiff sued the defendants, a firm of solicitors, in the 7th Division Court of the County of York, by special summons dated the 29th December, 1914. The defendants filed a note disputing the claim, and also disputing the jurisdiction of the Court, dated the 4th January, 1915. Judge Coatsworth, on the 12th January, transferred the case to the 10th Division Court: that Court received the papers on the 14th; notice was given by the Clerk of this transfer, and that the court-day would be the 27th May.

By some error, the case was put on the list for the 20th May; on that day it was called, and, no one appearing, judgment was given for the defendants without costs. The case was not put on the list for the 27th May or any subsequent day until the 23rd March, 1916.

On the 9th March, 1916, the solicitor for the plaintiff attended the 10th Division Court office to pay the fees which he had been (in the notice of transfer to that Court) required to pay, and to have the case entered for trial. Then for the first time he discovered that the case had been disposed of.

He forthwith applied, on notice, to the Judge, "for an order setting aside the judgment entered in favour of the defendants and for an order directing trial of the action." The Judge endorsed on the summons: "On the ground of irregularity new trial granted. Costs reserved. 13th March, 1916." He subsequently added a reference to "sec. 79, sub-sec. 2, of ch. 63, R.S.O.," and stated: "My reason for granting a new trial is that the case was improperly on the list for trial, and I consider my judgment a nullity—and the 14-day rule as to applying for a new trial does not, in my opinion, apply."

A motion was made in Chambers, before my brother Kelly, for an order prohibiting further proceedings in the action; and that learned Judge, on the 5th April, dismissed the application without costs. The defendants now appeal.

It is quite clear that the Clerk had no right to place the case on the list for trial on the 20th May; the statute is specific that he "shall place the action on the list for trial at the next sittings of his Court which commences six clear days or more after he receives the papers:" R.S.O. 1914, ch. 63, sec. 79 (2); and the 20th May is not "six clear days or more after" the 14th May. The case was, against the express direction of the statute, put on the list for trial: and it must be treated as though it was not there at all. The Judge had no power to try the case at that time—the statute is imperative—and I agree with His Honour that what he did was in violation of the statute.

There has been no "trial" in law, and sec. 123 does not apply. It is unnecessary to express any opinion as to whether *Re Nilick v. Marks*, 31 O.R. 677, was rightly decided, as it is not at all applicable. (The rule laid down in that case has been frequently and consistently followed ever since Morrison, J., in *Mitchell v. Mulholland* (1877), 14 C.L.J. 55, reversed his own judgment in the same case (1877), 13 C.L.J. 224.)

I do not see that any of the many cases cited has the least relevance to the present case.

The appeal should be dismissed with costs.

LENNOX and MASTEN, JJ., concurred.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

June 28.

GEORGE WESTON LIMITED V. BAIRD.

Covenant—Restraint of Trade—Master and Servant—Unreasonable Restrictions—Public Interests—Protection of Master—Inseparable Provisions—Refusal to Enforce Contract.

The defendant was employed by the plaintiffs as a salesman of their cakes and pastry, with which he was supplied at wholesale prices and which he sold at retail, the profit or loss being his. A restricted locality in a city was allotted to him. A few days after his employment began, he was asked to sign and did sign a contract with the plaintiffs whereby he covenanted, among other things, that he would not during his employment, or within twelve months after its termination, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery products, within the city of Toronto, for himself or for any other person, firm, or company than the plaintiffs. After continuing for more than a year as the plaintiffs' salesman, he left the plaintiffs and entered into the employment of a competing concern:—

Held, that the covenant, while reasonable as to time, was too wide as to locality and in other respects, and therefore unreasonable and unenforceable, because contrary to public interests and unnecessary for the plaintiffs' protection.

Held, also, that the reasonable and unreasonable parts of the contract were not separable.

Held, also, that there was a sufficient consideration for the restraint contracted for, in the employment of the defendant by the plaintiffs.

Semble, per MEREDITH, C.J.C.P., that the contract was obtained in such circumstances that it ought not to be enforced.

Skeans v. Hampton (1914), 31 O.L.R. 424, distinguished.

Allen Manufacturing Co. v. Murphy (1911), 23 O.L.R. 467, *Herbert Morris Limited v. Saxelby*, [1916] 1 A.C. 688, and *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724, specially referred to.

APPEAL by the defendant from the judgment of one of the Judges of the County Court of the County of York, in favour of the plaintiffs, in an action for an injunction and damages in respect of the defendant's alleged breach of an agreement or covenant "that he will not during his employment" (as cake-salesman and driver for the plaintiffs), "or within twelve months after its termination, whether by mutual consent or otherwise, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery products, within the city of Toronto, for himself or for any other person, firm, or company than the" plaintiffs, etc. By the judgment appealed from the plaintiffs were awarded an injunction and \$5 damages.

June 16. The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. *Bicknell*, for the appellant, argued, first, that he had been induced to sign the agreement by a false representation that all the other salesmen had signed a similar one; secondly, that the agreement could not be supported for want of consideration; thirdly, that the agreement was unenforceable, being in restraint of trade. He also contended that the restriction imposed upon the defendant was too wide in area, and was more comprehensive than was necessary for reasonable protection to the plaintiff in the actual scope of their business. On the latter points he referred to *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724; *Herbert Morris Limited v. Saxelby*, [1915] 2 Ch. 57; *Konski v. Peet*, [1915] 1 Ch. 530; *Perls v. Saalfeld*, [1892] 2 Ch. 149; *Baker v. Hedgecock* (1888), 39 Ch. D. 520; *Leng (Sir W. C.) & Co. Limited v. Andrews*, [1909] 1 Ch. 763; *Hooper and Ashby v. Willis* (1905), 21 Times L.R. 691; *Ward v. Byrne* (1839), 5 M. & W. 548.

E. B. *Ryckman*, K.C., for the plaintiffs, respondents, contended that there had been no misrepresentation. The learned trial Judge had so found. The employing of the defendant was sufficient consideration: *Skeans v. Hampton* (1914), 31 O.L.R. 424. The restrictions were not too wide, either in time or area. They were requisite to protect the interests of the plaintiffs: *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; *Allen Manufacturing Co. v. Murphy* (1910-11), 22 O.L.R. 539, 23 O.L.R. 467; *Anderson v. Ross* (1907), 14 O.L.R. 683; *Matthews and Adler's Restraint of Trade*, 2nd ed., p. 219. The defendant could go to Hamilton or Montreal or elsewhere and ply his trade.

Bicknell, in reply, said that the plaintiffs had no right to drive the defendant away from Toronto.

June 28. MEREDITH, C.J.C.P.:—There are two substantial questions involved in this appeal: namely, whether the restraint upon trade contracted for and sought to be enforced, in this case, is a reasonable one; and, if so, whether it was obtained under such circumstances that it ought not to be enforced. The third question, whether there was a sufficient consideration for the restraint contracted for, is an unsubstantial one; there was a *quid pro quo* in the employment of the defendant by the plaintiffs; and the question of *quantum* was one resting entirely in the judgment of the parties, not of the Court.

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Whether the restraint contracted for in this case was such a restraint upon the defendant's means of earning his livelihood as was reasonable or unreasonable, depends, of course, upon the circumstances of the case: and they were somewhat peculiar. It was not the ordinary case of hiring and service for wages. The defendant's position became that rather of a pedlar of the plaintiffs' wares: he was one of a dozen or so of such salesmen in the like employment: the pastry sold was carried by means of horse and waggon supplied by the plaintiffs, and each salesman seems to have had a restricted locality allotted to him. The wares were pastry of various kinds. The quantity required each day by each salesman had to be bespoken the second day before it was wanted, and all that was bespoken and supplied had to be paid for by the salesman.

When the defendant entered the plaintiffs' employment, he took the place of another, who was leaving, and had the benefit of the trade which had been worked up in one locality, subject of course to the competition of other pastrymen's salesmen and trade generally: but he had before been a salesman in this locality for other pastrymen, and had what might be called a personal trade; and was expected to increase and did increase the plaintiffs' trade in the locality. The defendant was supplied with the plaintiffs' wares at wholesale prices, and sold them at retail, the profit, or loss when all were not sold, was his: he received no pay in any form from the plaintiffs.

After continuing for more than a year as such salesman, on such terms, the defendant left the plaintiffs and entered into the employment of a competing firm, or company, of pastrymen, whose service he had been in before going to the plaintiffs. He had apparently been in this occupation of a pastry pedlar in the same locality for about three years, ever since coming to the country.

The restraint which the contract in question puts upon the defendant is, as to time, limited to one year, and is not unreasonable in that respect; but, as to locality, it covers the whole of the city of Toronto, with its nearly half a million inhabitants, and covers selling, delivery, serving or soliciting orders for, any cakes, confectionery, and pastry, or other bakery products, for himself, or for any other person, firm, or company, except the plaintiffs: and so, as it seems to me, is far too wide to be needful

for the plaintiffs' protection, or to be reasonable from any point of view.

In the first place, what need to cover the whole city of Toronto; what justification for any restraint beyond what would prevent the defendant taking advantage of the trade to which his connection with the plaintiffs introduced him, or, more plainly put, those who were really the plaintiffs' customers? Merely because some man may be guilty of a breach of a reasonable restraint, is not a good reason for imposing an unreasonable restraint; the proper remedy is in enforcement of the reasonable contract.

Then why include "confectionery?" As pastry and cakes are also included, confectionery would probably include sugar confectionery, which has no part in the plaintiffs' trade. And why other bakery products? The plaintiffs did not make or deal in any other.

I cannot find any justification for this contract, which would either drive the defendant out of his home in Toronto altogether, or out of his trade altogether; and so consider the contract invalid, that is, unenforceable in the Courts of this Province, because contrary to public interests—against the welfare of the country; and unnecessary for the plaintiffs' reasonable protection.

On the other substantial question too, this action, in my opinion, should be dismissed.

The plaintiffs had a much more reasonable contract of this character, but were not content with it apparently, and had the more stringent one, which is in question in this action, prepared for them. When the defendant was asked to sign the contract in question, he was told that all the other salesmen had signed an agreement the same as it: but that was not so; seven were still serving under the early and much more reasonable contract; six only, including the defendant, had signed the later one.

Upon that misstatement the defendant signed the agreement in question; and, that being so, how could any Court compel the defendant, at the instance of those who misled him, to perform the onerous terms of that contract so obtained? The evidence of the plaintiffs' agent who procured the defendant's signature to the contract in question is quite as strong as that of the defendant in regard to the misstatement upon which the contract was signed.

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The appeal must be allowed and the action dismissed, both with costs. The case is plainly not one in which the reasonable and unreasonable parts of a contract are separable, so that the reasonable may be enforced without affecting the unreasonable and without prejudice to any rights of the parties: see *Allen Manufacturing Co. v. Murphy*, 23 O.L.R. 467.

Nothing which I have said conflicts with anything that was decided in the case of *Skeans v. Hampton*, 31 O.L.R. 424. The only question considered in it, besides the question of valuable consideration, was: whether the defendant had committed a breach of the contract in question in that action.

LENNOX, J.:—The plaintiff company are engaged in the manufacture and sale of cakes and biscuits in the city of Toronto. The company use cake-waggons, and effect sales through agents or salesmen, to whom are assigned defined routes. Each agent is in charge of a waggon, and from day to day works within the area assigned to him, solicits orders, and, when he effects a sale, makes an immediate delivery from the waggon, and collects payment. The salesmen are paid for these services by a commission of 9 per cent. upon the amount of cash turned in from night to night. The company allege that in this way their trade covers the whole of the city of Toronto. It is not claimed that salesmen become possessed of trade secrets, in the strict sense of that term, or acquire a knowledge of secret processes or methods of production; but it is claimed, and it is the fact, that a salesman necessarily gets to know the names and residences of the people who occasionally or generally buy goods from his waggon along his route. I judge from the very limited number of customers upon a single route, 28 on this route, that the percentage of those who buy is not very high, and the same would be true of the whole city, based upon the total number of householders, hotels, etc.; and it is reasonable to infer, too, that many of the sales are in a sense casual; that the company are constantly losing old customers and getting new ones.

The defendant swears that he is by occupation a cake-salesman, and by this I understand he means that this is his regular and only calling. He came to Canada about three years ago and entered the service of the Eclipse Baking Company in the city of

Toronto, as a cake-salesman, and remained in the service of that company until he became employed by the plaintiff company, about the beginning of February, 1915. He got some assistance for the first few days from one of the company's other employees. On the 6th February, he signed an agreement, not executed by the company, in the following terms:—

“Agreement, made this 6th day of February, 1915, between James Baird, hereinafter called the “employee,” and George Weston Limited, hereinafter called the “employer.”

“The employee hereby agrees to enter the service and employment of the employer as cake-salesman and driver, at and for a commission of not less than 9 per cent. on all cash taken in by him in trust for and received by the employer.

“In consideration of such employment, the employee covenants and agrees with the employer that he will not during his employment, or within twelve months after its termination, whether by mutual consent or otherwise, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery products, within the city of Toronto, for himself or for any other person, firm, or company than the employer, and that he will not interfere with or prejudice in any way, either directly or indirectly, any present or former customers or the business of the employer, and that he will during his employment devote all his time, ability, and energy to advancing honestly the interests and business of the employer.

“The employee agrees to guarantee payment of all outstanding accounts for goods sold or delivered by him or to customers secured by him; and that he will abstain from the use of intoxicating liquors while on duty.

“The employment may be terminated by either party at any time without notice, and thereupon an accounting and payment accordingly shall be made.

“In consideration of the aforesaid covenants and agreements, the employer hereby agrees to take the employee into its service, and to give him steady employment so long as his conduct and services are satisfactory.”

There is nothing in the fact that the defendant was in a sense in the service of the company before he signed the agreement. He was making trial trips only, his engagement was conditional

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upon his proving to be efficient and satisfactory, and the authorities are clearly and uniformly against the defendant in such circumstances; and it is so, generally, even where there has been previous service of a permanent character.

The restraint provided for, having regard to the extent and character of the company's business, is reasonable as to time, and the area is not too wide to be embraced in an effective agreement if properly confined to the actual connection of the defendant with the company's business and customers, and limited to what is reasonably necessary to prevent prejudice to the company's proprietary rights arising out of the employment. There was legitimate scope for an effective restrictive agreement of a limited character; it could have been framed, entered into, and enforced, but I am of opinion that the agreement in question is not of this character, attempts too much, is unfair to the defendant, prejudicial to the public interest, and not enforceable in whole or in part. In its terms, and upon the evidence, it goes to an attempt to prevent competition of a character not arising out of, and throughout an area wider than the proposed or actual scope of, the defendant's employment.

What is reasonably necessary for the protection of the covenant is allowable. It is not a question of the adequacy of the consideration. There must be a consideration, but its nature and quantum, if valuable, is for the parties to determine: *Hitchcock v. Coker* (1837), 6 A. & E. 438, and many subsequent cases; Halsbury's Laws of England, vol. 27, p. 565, para. 1097; mere employment is sufficient, and this although the servant may be dismissed at any time: *Skeans v. Hampton*, 31 O.L.R. 424. But, in considering a contract restraining the exercise of industry or skill, or the acquisition of a livelihood, Courts do not ignore the fact that only employment of temporary or uncertain duration is secured.

In *Herbert Morris Limited v. Saxelby*, [1916] 1 A.C. 688, the plaintiff company specialised in hoisting and moving plants, had establishments in many of the chief cities in the United Kingdom and a world-wide trade connection. The defendant entered their service when he left school, and everything he knew as an engineer and about machinery or trade business was acquired while in the company's service. By the agreement sued on, the

second he had entered into after coming of age, he covenanted not, directly or indirectly, for himself or others, to engage in Great Britain and Ireland in manufacturing or dealing in certain machinery of a class manufactured and sold by the defendant company, for a period of seven years after termination of his services with the company. The company sought to restrain him from engaging in the service of a rival concern, specialising in the same lines, and failed in all the Courts. In the House of Lords the authorities are reviewed and the principle upon which the Courts act elaborately discussed. Lord Atkinson, at p. 699, quoted the following statement of the law from the judgment of Lord Macnaghten in the *Nordenfelt* case, [1904] A.C. 535: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford *adequate protection to the party in whose favour it is imposed*, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

The application of this principle, just as stated, defeats the claim of the plaintiff company; but Lord Atkinson, guarding against possible misapprehension of the words I have italicised, points out the sense in which this phrase is to be understood, and says (p. 700): "If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void; the onus of establishing to the satisfaction of the Judge who tries the case facts and circum-

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stances which shew that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character, and the onus of shewing that, notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting, in like manner, on the party alleging the latter."

Until the defendant (Baird) entered the service of the plaintiff company, his only knowledge of Toronto trade was acquired in the service of their trade rival, the Eclipse Baking Company, and by canvassing for them on a route in the east end; and, whether by accident or design, it happened that the plaintiffs' previous salesman was then sent elsewhere, and the defendant, in the new service, was put to work and kept upon the same route; and at that time and under these circumstances the company exacted from the defendant the drastic conditions now in question.

Can it be said in this case that the restraint proposed is not prejudicial to the public interest and "affords to the person in whose favour it is imposed *nothing more than* reasonable protection against something which he is *entitled to be protected against*?" Was it reasonably necessary to impose upon the defendant conditions directly calculated to prevent him from earning an honest living in the only calling he could efficiently exercise, to shut him out from 95 per cent. of the whole highway mileage of the city of Toronto, to him unexplored, and wholly untouched in the service of the company; to debar him not only from soliciting orders for or selling goods of the class dealt in by the company, to customers of the company with whom the defendant came in contact in the service, but also to debar him from selling these goods or other bakery products not dealt in by the company over the counter at any point in the city of Toronto, "or deliver or serve" by vehicle or otherwise these "or (any) other bakery products" whatever, upon a sale made by anybody to any inhabitant of this city or temporary sojourner therein, known or unknown to the defendant; was it necessary for the fair protection of the company to paralyse the activity of the defendant, deprive the public of the benefit of his industry, stifle legitimate competition, and induce at least the possibility of increased charges upon public and private charity?

The defendant learned his trade in the old country, and brought it with him when he came to Canada; and he developed his aptitude as a salesman and acquired a knowledge of Canadian conditions in the service of city rivals of the plaintiff company. It was otherwise with Mr. Saxelby, who acquired all his training and technical knowledge in the service of the Herbert Morris company.

I quote again from Lord Atkinson in the *Herbert Morris* case (p. 702): "He" (the employer) "is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from competition *per se* apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee." And at pp. 703, 704: "The respondent cannot, however, get rid of the impressions left upon his mind by his experience on the appellants' work; they are part of himself; and in my view he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in the service of some persons other than them the general knowledge he has acquired of their scheme of organisation and methods of business."

In the judgment of Lord Parker, reference is also made to the part of the judgment of Lord Macnaghten above quoted, and to "adequate protection" to the covenantee. He says (p. 707): "With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed." And at p. 710: "In *Mason v. Provident Clothing and Supply Co.* it was argued, apparently for the first time in this class of case, that an employer might reasonably say 'I will not have the skill and knowledge acquired in my employment imparted to my trade rivals,' and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against

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which the master was entitled to protect himself. The argument was rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets."

Lord Shaw, at p. 714, says: "Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large."

In *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724, the House of Lords, assuming without deciding that the contract was unobjectionable as to area, decided that the restrictive covenant was unenforceable, upon principles which, to my mind, govern the determination of this action. The company carried on, by methods which they claimed to have devised and exclusively adopted, a very extensive clothing and supply business throughout the United Kingdom and elsewhere. I need not set out the terms of the contract. The defendant, as here, was engaged to canvass and obtain customers for the company, and the provisions in restraint of subsequent employment, although more elaborately expressed, were substantially equivalent to the agreement now under consideration, and identical in purpose and anticipated effect. Viscount Haldane, L.C., said (p. 731): "My Lords, this is not the case of an agreement made to protect the sale of a goodwill, or to guard against the disclosure of special trade secrets. The capacity of the servant must obviously, from the character of the business as I have described it, be due mainly to natural gifts as a canvasser, and only in a secondary degree to special training. If so, it is necessary to

consider carefully the extent of the restraint imposed. Such agreements are frequently insisted on, but they are invalid if they go beyond what is necessary for the protection of the rights of the employer. Whether there are such rights must depend on the character of the business. Now, the character of the respondents' business does not appear to me to be such as to entitle them to say that they had any right which justified them in excluding the appellant from exercising his talents, such as they were, altogether or within a wide area. Had they been content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits. He appears, indeed, to have been, in point of fact, carrying on his canvassing for a similar business very near to his old place of employment, and it is probable that by a properly limited clause they might have restrained him from doing this. But the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid. My Lords, such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the Courts have always regarded such restrictions with jealousy. . . . The respondents have to shew that the restriction they have sought to impose goes no further than was reasonable for the protection of their business. . . . I can find nothing to lead me to think that the canvasser could become possessed of any special knowledge of the kind recognised as a trade secret. . . . No doubt he might acquire, in the course of his employment, lists of actual or possible customers in the district in which he had canvassed. I think that under a properly limited clause the employers would have been entitled to restrain him from canvassing such customers. But this is not the clause which the respondents in this case did frame. . . . The practice of putting into these agreements anything that is favourable to the employer is one which the Courts have to check, and the Judges have to see that Lord Macnaghten's test is carefully observed."

Lord Shaw in the same case said (p. 741): "A very reasonable restriction of a canvasser in such circumstances as are here dis-

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closed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour. This the law would naturally and properly enforce, and look upon as a reasonable protection of the employer. But to extend it from that to the wide range which I have set forth appears to me to be a thing under the guise of a contract which is not protection for the employer, but a means of coercing and punishing the workman and putting him under a tyrannous and, therefore, a legally indefensible restraint."

I am of the opinion that this was not the object sought to be obtained by the contract now in question. In other respects, I have not been able to detect an expression in the language of the two noble Lords, just quoted, which might not without material qualification be applied to the case before the Court. The relevant cases are pretty fully collected and discussed in the cases I have quoted from, and leave no doubt upon my mind as to the principle upon which the Courts have almost uniformly acted in cases of restraint obtained by employers of labour, particularly where an oppressive, unnecessary, or unreasonable restraint has been attempted.

The paramount consideration is always the public interest. Subject to this consideration, the recognised aim is freedom of trade and freedom of contract. "Sanctity of contract" is not literally an issue in these cases. If the Court refuses to enforce the attempted restraint, it is simply that in point of fact there has been no contract in law—no legally effective contract to hamper freedom of action. The ultimate question, too, always is, how will it affect the public interest; and this not merely as to the effect in the particular instance, but how would restraints of the kind and type proposed affect the public, if they became general? See Lord Shaw in the *Herbert Morris* case, at p. 716. The covenantee can only protect that which is his, the product of expenditure of some kind or what he has acquired by foresight, industry, energy, enterprise, or skill; something paid for in some way by himself or those whose title he has; he will not be allowed to appropriate or destroy the rights of the State to the benefit which should accrue from the industry, education, skill, capacity, or aptitude of its people. He must not, with the restraints which he can lawfully obtain, the legitimate protection of his own interests, combine an attempt to stifle competition, paralyse individual

effort, or run counter to the public good. The onus is upon him to shew that the restriction is no more than is necessary for legitimate protection; and this not by assertion of witnesses at the trial, but by evidence of the nature and extent of his business, and upon a fair construction of the agreement in the light of the facts and circumstances of the particular case. See Lord Haldane in the *Mason* case, p. 782.

It is true that some of the restrictions may be enforced and others disregarded, if the provisions are distinctly severable: *Baines v. Geary* (1887), 35 Ch. D. 154; *Chesman v. Nainby* (1727), 1 Bro. P.C. 234; *Mallan v. May* (1843), 11 M. & W. 653. I gave effect to this rule and restrained the defendant from soliciting custom along the trade route he had travelled for the plaintiff, in *Skeans v. Keegan* (1916), 10 O.W.N. 225. But Courts are reluctant to exercise this power, and will only do so, if at all, where the valid are clearly severable from the invalid restrictions. The Court should not be asked to devise or frame an *ex post facto* contract.

In the *Mason* case, Lord Shaw said, at p. 742: "In my opinion, further, Courts of law should not be astute to disentangle such contracts and to grant injunctions or restraints which are not justified by their terms. There is no occasion for the framing, in the present instance, of a limited injunction, the contract not being in separate or clearly-defined divisions." And at p. 745, Lord Moulton said: "My Lords, I do not doubt that the Court may, and in some cases will, enforce part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be *pessimi exempli*, if, when an employer has exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master."

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I have not overlooked Mr. Ryckman's well-presented argument, or the hazy suggestions in the evidence, of the need for a strenuous and far-reaching agreement to prevent information or suggestions to a subsequent employer, communications between drivers, or other possible or theoretic difficulties of this character. It might be enough to say that no breach, actual or contemplated, has been shewn, and that the agreement does not stop at this point. The action is for an injunction; and as yet there has been no breach of this nature committed, and there is none in sight—nothing to enjoin. But, aside from this, is there a tangible possibility even of substantial inconvenience to the employer? *De minimis non curat lex* is not to be flippantly affirmed or invoked in disregard of proprietary rights, even if involving only comparatively trifling individual sacrifice. But, while Courts are bound to endeavour to safeguard the individual *right* of every litigant, yet, in the construction of a statute or the enunciation or perpetuation of a principle of law, when a question of public policy is also involved, possible or conjectural individual inconvenience should be subordinated to what must always be the paramount consideration in cases of this character: a steady aim to secure "the greatest good to the greatest number." It is not a question of denying or sacrificing individual *right*, but whether, having regard to the public interest, *the right set up* can be allowed to arise and vest—a *created right of the covenantee*. Considerations, pointedly distinct from those arising on the sale of a business or goodwill, are presented in the case of an attempt to restrain unduly the right to earn and the duty to toil—in pursuance of the Divine command.

It is not enough to say that the defendant can seek employment in Montreal or Ottawa or Hamilton; subject to the restrictions already pointed out, he has the right to live and labour here, and the people here have the right to the gain resulting from industry and legitimate competition. The plaintiff company had no right to attempt to prevent it.

The appeal should be allowed and the judgment set aside, with costs here and below.

RIDDELL and MASTEN, JJ., concurred.

Appeal allowed.

[KELLY, J.]

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June 28.

HIRSHMAN v. BEAL.

Motor Vehicles Act—Negligence of Person Driving Vehicle without Authority—Liability of Owner—R.S.O. 1914, ch. 207, sec. 19—Amendment by 4 Geo. V. ch. 36, sec. 3—Person in "Employ" of Owner—"Stolen it from the Owner."

Section 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, as amended by 4 Geo. V. ch. 36, sec. 3, provides that the owner of a motor vehicle shall be responsible for any violation of the Act, unless at the time of such violation the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner.

S., the foreman of a repair-shop, where the defendant's motor vehicle had been repaired, took it out to test it; but, having done so, instead of returning it to the shop, continued to drive it for his private purposes, without any authority from the defendant, and, in doing so, by his negligence injured the plaintiff:—

Held, that S. was not in the "employ" of the defendant; that he had stolen the vehicle from the defendant; and that the defendant was not liable for the plaintiff's injury.

ACTION for damages for injuries sustained by the plaintiff, a boy of five years, suing by his next friend, by coming into contact with the defendant's automobile, in a public highway in the city of Toronto.

The action was tried by KELLY, J., and a jury, at Toronto.

E. F. Singer, for the plaintiff.

T. N. Phelan, for the defendant.

June 28. KELLY, J.:—The plaintiff, Harry Hirshman, a boy of about five years old, through his next friend, seeks damages for injuries sustained when he came in contact with the defendant's automobile on Elizabeth street, in Toronto, on the 22nd September, 1915. He charges negligence on the part of the driver.

On the morning of the 22nd September, the defendant drove his motor car to the garage of Andersons Limited, in Yonge street, for some minor repairs or adjustments. There he saw Sheppard, the foreman mechanic. About, or shortly after, midday, he returned to the garage for the car, and learned that Sheppard had taken it out. He waited for about an hour and a half, and Sheppard then returned, driving the car. The defendant then took it and drove to his office in Wellington street.

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About a month afterwards, he received a telephone communication, from whom he was unable to say, that the car had been in an accident. This was a surprise to him; it was the first intimation he had had of any such occurrence. Afterwards, the father of the plaintiff interviewed him, when he repudiated any personal knowledge of the accident.

Sheppard's explanation at the trial was that the defendant brought the car to Andersons Limited to have some trouble in the transmission rectified; that he, Sheppard, having repaired it, took it out to test it, and having done so, and though he knew he should have returned it to the garage, he drove it without authority and without the defendant's knowledge or consent, and on his own account, to his residence in a remote part of the city to have his luncheon, after which he invited his wife and other friends to drive with him to the business section of the city, where they were going on a shopping expedition. In the course of this drive, the plaintiff was injured by the car, a short distance south of Agnes street, in Elizabeth street. The place of the accident is nearer the business part of the city than the Anderson garage. Had he gone to the garage by any direct route from his home, he would not have passed the place of the accident.

He did not report the occurrence to his employers, Andersons Limited, nor to the defendant, though he saw the latter when he arrived with the car at the garage.

After the defendant had learned the particulars of the occurrence and that Sheppard had used the car for his own purposes, an information was laid against the latter, and in the Police Court he was convicted of theft of the car and punished.

The plaintiff's charge of negligence against the defendant is in driving the automobile "carelessly, recklessly, and at an excessive rate of speed, and without blowing his horn or giving any other warning to the plaintiff of the approach of the said automobile," and that the defendant "did not comply with the provisions of the Motor Vehicles Act, R.S.O. 1914, ch. 207, and amendments thereto, more especially secs. 6-11 and 18."

The jury, in answer to questions, found that the plaintiff's injuries were due to the negligence of Sheppard, and that such negligence consisted in "not stopping the car within reasonable distance as he saw the child;" they negatived any negligence on

the plaintiff's part. To the further question as to what Sheppard should have done or omitted doing to avoid the accident, they answered, "Used more care."

The defendant's first objection is that the relationship of Sheppard to him and the circumstances under which he was in possession of and making use of the car at the time of the accident are such as to relieve him from liability. This objection was taken in a motion for nonsuit at the close of the plaintiff's case, and, decision having been reserved to enable the jury to find the facts, at the close of the whole evidence it was again pressed in argument. The defendant also argued that what the jury found to be negligence of Sheppard does not come within what the plaintiff has charged as negligence.

The first ground of objection is based chiefly upon two contentions: (a) that Sheppard at the time of the accident, when, it is alleged, the Motor Vehicles Act was violated, was not in the employ of the defendant, and (b) that he had stolen the car from the defendant.

It seems to me that it would be going much further than the Act contemplates to hold that a servant or employee of the owner or operator of a garage or factory, to whom an owner entrusts his motor car for purposes of repair only, becomes a person in the employ of the owner of the car, and particularly at a time when such servant or employee was secretly using it for his own purposes and without the knowledge or consent, and really against the will, of the owner. Applying the tests generally used in determining what is meant when one refers to a person in the employ of another, such as the right to direct him in the performance of his duties, the right to dismiss from the employment or service, and the obligation to pay wages or salary for his services, the relationship which Sheppard held to the defendant falls far short of qualifying him as one in the employ of the defendant, in the sense the Act intended. My opinion is that Sheppard was not so in the defendant's employ, an opinion which is not out of accord with the conclusions arrived at in any of the authorities cited for the plaintiff, when the circumstances of each case are, as they must be, considered.

To determine whether the car was stolen within the meaning of that term as used in the amendment made to sec. 19 of the

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Motor Vehicles Act by 4 Geo. V. ch. 36, sec. 3,* the circumstances under which Sheppard made use of this car are of importance. It is not and cannot be disputed that, in so far as it was necessary to use it for the purpose of determining by a demonstration of its running whether the repairs done upon it by Andersons Limited for the defendant were effectively done, such use was not improper, and it may have been implied in the defendant's instructions for repairs. It may be assumed, therefore, that to that extent, but limited in that way, Sheppard had authority from his employers, Andersons Limited, to drive the car. While so in possession of the car he appropriated it to his own use to answer his own purposes, and drove it still further away from the garage to his own home, detained it there while having his dinner, invited his friends to drive with him, and conveyed them on their business beyond where it was necessary to go to reach the garage, and while so doing the accident happened. He had no authority, express or implied, from the owner of the car so to use it; there is no evidence that he had such authority. It is quite clear from the defendant's evidence that no such privilege would have been accorded him had he sought it, and it is a fair deduction from Sheppard's evidence that he realised that, in using it as he did use it, it was against the will and without the consent of the owner. The secrecy which he maintained both towards his employers and the defendant about his doings that afternoon also points to that fact.

The plaintiff's counsel contends that Sheppard's conduct at most amounted to a civil trespass and not to an act of a criminal nature, such as the amendment to the Motor Vehicles Act refers to; but I cannot believe that, stringent as are the terms of that Act, it could have been intended that liability should attach to an owner under the conditions now present. Rather was it in such a case as this that the amendment aimed at exculpating the owner from the rigorous penalties imposed by the Revised Statute.

Whether Sheppard's conviction for theft in the Police Court

*Section 19 as amended: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

should or should not weigh or be accepted as evidence of theft, is immaterial. It is unnecessary to rely upon that fact in determining that there was a theft such as is referred to in the amending Act. Much was made of the argument that Sheppard, in appropriating the car to his own use and driving it without authority, did not act *animo furandi*, and that without the *animus furandi* there could be no offence. But can it be successfully contended that one in Sheppard's position, who, secretly and for his own purposes and without the authority, knowledge, or consent of the owner, appropriates an article and uses it for his own benefit, knowing, as I am sure he knew, that the owner would not have given authority for its use, had not the *animus furandi* necessary to constitute his act a theft such as the statute means? The answer must be that it cannot. That seems to have been the view of the framers of the amendment made to the Criminal Code by 9 & 10 Edw. VII. ch. 11, which declares that: "Every one who takes or causes to be taken from a garage, stable, stand, or other building or place, any automobile or motor car with intent to operate or drive or use or cause or permit the same to be operated or driven or used without the consent of the owner shall be liable, on summary conviction, to a fine not exceeding \$50 and costs or to imprisonment for a term not exceeding 30 days." The taking there referred to was considered to be a theft, and was made punishable as such.

Downs v. Fisher (1915), 33 O.L.R. 504, is cited as authority for the plaintiff in support of the contention that Sheppard was a person in the employ of the defendant, and that his act did not constitute a theft. That decision was arrived at having distinctly in mind the circumstances indicating that, to some extent at least, the driver had the right or authority to drive the car. There is a clear distinction between the two cases.

The action, in my opinion, should be dismissed with costs.

[An appeal by the plaintiff from the above decision was heard by a Divisional Court and on the 20th October, 1916, allowed. The reasons for the judgment of the Divisional Court will be reported in due course.]

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[HODGINS, J.A.]

June 30.

BLAND V. BROWN.

Appeal—Stay of Execution of Judgment—Exception as to Injunction—Rules 496, 498—Possession of Land—Breach of Injunction—Contempt of Court—Motion to Commit.

The judgment pronounced at the trial of this action directed the immediate delivery by the defendant to the plaintiffs of possession of the lands in question, and restrained the defendant from trespassing upon or in any way interfering with the plaintiffs' possession. The trial Judge directed that the defendant should be allowed to occupy the house and barns on the lands "for 15 days, or until appeal, if any, may be had." An appeal having been lodged, and the defendant continuing to occupy the house and barns, the plaintiffs moved for his committal for contempt of Court:—

Held, that, an appeal having been lodged, the situation was governed by the Rules; and the effect of Rule 496, coupled with Rule 498, was to stay all further proceedings in the action other than the issue of the judgment and the taxation of costs.

Held, also—the effect of the injunction not being stayed (Rule 496), but the plaintiffs not being in a position, by reason of the stay of other proceedings, to enforce their judgment for immediate possession, and not being in actual possession—that the defendant was not guilty of a breach of the injunction.

Seemle, that the plaintiffs' proper course would be to apply under Rule 496 to a Judge of a Divisional Court to remove the stay.

MOTION by the plaintiffs to commit the defendants for contempt of Court by disobedience of a judgment.

June 29. The motion was heard by HODGINS, J.A., in the Weekly Court at Toronto.

G. H. Kilmer, K.C., for the plaintiffs.

W. Proudfoot, K.C., for the defendant.

June 30. HODGINS, J.A.:—This is a motion by the plaintiffs to commit the defendant for breach of an injunction contained in the judgment of Clute, J., at the trial.

The judgment directs the immediate delivery of possession by the defendant to the plaintiffs of the lands in question, and then proceeds: "This Court doth further order and adjudge that the defendant be and he is hereby restrained until the 1st day of April, A.D. 1918, from trespassing upon or in any way interfering with the plaintiffs' possession of the said lands."

The ground of the application, as stated in the notice of motion, is that the defendant, "notwithstanding the said judgment, has retained possession of the said lands and occupied the

dwelling-house and barns thereon, and continues to do so, and refuses to deliver up possession thereof to the plaintiffs."

The affidavit of one of the plaintiffs is as follows: "1. The defendant is still in possession of and occupying the lands in question in this action, being lot number forty-six in concession A or lake range in the said township of Kincardine (save and except the easterly fifty acres thereof) and in possession of the dwelling-house and buildings thereon."

The learned trial Judge made the following note at the conclusion of the case: "Judgment for plaintiffs for possession and injunction and costs—to be allowed to take immediate possession to put in crop. Defendant to be allowed to occupy the house and barn (plaintiffs to have stabling for horses at noon) for 15 days, or until appeal, if any, may be had."

An appeal has been taken and it has been set down for hearing.

Under Rule 496 the effect of the injunction is not stayed, "unless so ordered by the Judge appealed from or by a Judge of a Divisional Court" (Mr. Holmsted's Judicature Act gives the Rule as being "unless so ordered by the Judge of a Divisional Court:" p. 1102).

As I read the learned trial Judge's note, he has stayed the judgment only for fifteen days or until an appeal is had, i.e., if an appeal is lodged, then his stay is at an end, and the Rules govern the situation.

The effect of the Rule quoted, coupled with Rule 498,* is to stay all further proceedings in the action other than the issue of the judgment and the taxation of costs.

Hence the plaintiffs cannot enforce the delivery of possession ordered by the judgment by the issue of a writ of possession under Rules 540 and 541; and the refusal, on the 16th day of June, 1916, of the defendant to give possession of the lands is justified, or, if only justified by the setting down of the appeal, no contempt punishable by attachment should now be adjudged.

The only remaining question is whether, there being no stay of the injunction granted restraining the defendant from tres-

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*498. Where the execution of a judgment is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment, and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by a Judge of the Divisional Courts.

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passing upon or in any way interfering with the plaintiffs' possession of the said lands, the motion to commit is in order.

If the plaintiffs cannot enforce their judgment for immediate possession of the lands by reason of the stay, and are not in actual possession, I am unable to see how the defendant is guilty of a breach of the injunction which proceeds upon the implication that the plaintiffs are entitled to immediate possession. This they have not in fact got and cannot get until they are in a position to enforce their judgment.

It seems that the plaintiffs' proper course would be to apply under Rule 496 to a Judge of a Divisional Court to remove the stay given by that Rule, on proper terms; when the possession of the defendant may be restricted, if it is necessary for the proper care of the farm and the gathering in of its products so as to prevent injury to the plaintiffs' rights, until the appeal can be heard.

The result is that the motion must be refused. The costs of it should be to the defendant in the appeal in any event thereof.

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July 5.

[HODGINS, J.A.]

RE ZEAGMAN.

Will—Residuary Gift of Mixed Fund to Church—Masses for Repose of Soul of Testator and Descendants for ever—Superstitious Use—Perpetuity—Charitable Use—Limitation to Personality—Originating Notice—Time for Realising Residue not Arrived—Costs.

A bequest for the saying of masses for the repose of souls is not in this Province void as superstitious.

Elmsley v. Madden (1871), 18 Gr. 386, followed.

A bequest of the residue of the testator's estate (consisting of both realty and personality) to a church, "to be invested and kept invested . . . for ever and the interest . . . to be applied and expended . . . for the saying of Holy Masses . . . for the repose of the soul of the testator and his descendants for ever," was held, ineffective as creating or tending to create a perpetuity, and not a charitable use.

O'Hanlon v. Logue, [1906] 1 I.R. 247, not followed.

West v. Shuttleworth (1835), 2 My. & K. 684, and *Heath v. Chapman* (1854), 2 Drew. 254, followed.

Semble, that in any case the personality alone would have been applicable to the trust declared.

The questions arising upon the will were (in the absence of objection) considered upon an originating notice notwithstanding that the time had not come for realising the residue.

In re Staples, [1916] 1 Ch. 322, followed.

Costs of all parties as between solicitor and client were allowed out of the estate.

In re Hall-Dare, [1916] 1 Ch. 272, followed.

MOTION by the executors of John Zeagman the elder, deceased, for an order determining a question arising upon the residuary clause of his will.

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June 29. The motion was heard by HODGINS, J.A., in the Weekly Court at Toronto.

A. E. Knox, for the executors.

H. S. White, for St. Basil's Church, a legatee.

G. Keogh, for the next of kin of the deceased.

July 5. HODGINS, J.A.:—Originating notice to construe the residuary clause in the will of John Zeagman the elder, who died on or about the 17th day of February, 1895.

That clause and those preceding it are as follows:—

"I give devise and bequeath to my said executors all the residue of my estate real and personal of whatsoever nature and wheresoever situate upon the trusts following that is to say to pay all my just debts funeral and testamentary expenses.

"To pay to the Superior Priest of Saint Basil's Roman Catholic Church Toronto the sum of one hundred dollars as soon as conveniently may be after my death for Holy Masses for the repose of my soul.

"To allow my wife Margaret Zeagman and my daughters Mary Zeagman and Elizabeth Kneitak to use occupy and enjoy the rents interest and benefits of all my real and personal estate not hereinbefore disposed of for and during the term of their natural lives and life of each of them respectively.

"And it is further my will that my said executors do as soon as conveniently may be after the deaths of my said wife and daughters sell all my real estate and collect and get in all my personal estate and from the proceeds thereof pay to each of the children of my son Charles Zeagman the sum of one hundred dollars and pay over all the residue of my estate to the Saint Basil's Roman Catholic Church of Toronto to be invested and kept invested in such funds as the Most Reverend Archbishop of the Diocese of Toronto and his successors may think best for ever and the interest arising from such investment or investments to be applied and expended by the Reverend Clergy of said Church for the saying of Holy Masses by said Clergy for the repose of the soul of the testator and his descendants for ever."

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The widow and Mary Zeagman are dead, and the surviving life-tenant is an executrix, who, if the devise in question to St. Basil's Church is inoperative, would share the residue with her co-executor and her brother John.

The time has not arrived for realising the residue, but no objection is taken to the motion as being premature. In view of the opinions expressed and quoted in *In re Staples*, [1916] 1 Ch. 322, I think the question raised may be decided now without hurt to any one.

The objections to the disposition of the residue are, that it is (1) superstitious, (2) offends against the rule as to perpetuity, (3) is not to a person or corporation properly described who can rightly take it.

The bequest for the saying of masses for the repose of souls is not superstitious in this Province. Sir John Romilly in *In re Michel's Trust* (1860), 28 Beav. 39, explains why bequests for such a purpose were treated in England as being superstitious. He says (p. 43): "In the time of Edward the Sixth and Elizabeth the ceremony of mass was considered superstitious, and I do not know that the law made any distinction between masses generally and masses for souls, or any distinction between those said for the general purpose and object of their religion in the worship of God and those which are for more limited objects, which were formerly considered superstitious and which the Court now, considering them in a Protestant point of view, still regards as superstitious."

Halsbury's Laws of England, vol. 4, p. 120, defines a superstitious use as "one which has for its object the propagation of the rites of a religion not tolerated by the law;" and adds, on the authority of *Cary v. Abbot* (1802), 7 Ves. 490, 495, that there is no statute making superstitious uses void generally. This lack, however, was supplied by the Judges, who practically, by their decisions on the Statutes of Henry VIII. and Edw. VI., made all such uses to be invalid, as against the general policy of the law. See *West v. Shuttleworth* (1835), 2 My. & K. 684, at p. 697.

But those Acts and the decisions founded upon them are not effective out of England. In Bouchier-Chilcott's Law of Mortmain, p. 100, it is pointed out that there is no analogous statute to 1 Edw. VI. ch. 14 in force in Ireland, and that that fact is

the sole ground of difference between the decisions in England and Ireland in regard to superstitious uses. To the same effect as to British Colonies is the case of *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381.

In *Elmsley v. Madden* (1871), 18 Gr. 386, a decision that has not been questioned so far as I can find, Sir Henry Strong, then Vice-Chancellor, held that a bequest of £15, "to be expended in paying for masses to be said for the soul" of the testator, was valid. The ground he took was that, as by our law all bodies of Christians enjoy equal toleration, there was nothing to prevent the testator from appropriating money to a purpose which his religion had taught him was one of importance to his spiritual welfare. This view is in harmony with that expressed as his own opinion by Sir John Romilly in *In re Michel's Trusts* (*ante*), in discussing the effect of the relieving statutes in England. A similar bequest in this will is not questioned.

Apart from *Elmsley v. Madden*, I should have thought the point clear, when the meaning of the term "superstitious uses" is understood, but I am glad to have such high authority to follow.

The devise or bequest of the residue, however, is one of a mixed fund of realty and personalty. It is to "St. Basil's Roman Catholic Church," and only the income from it is to be expended in masses, and that for ever.

It is said that this makes it void unless it is a charitable use, and, if the latter, that it would be bad as to all except personalty.

The decision in *Elmsley v. Madden* (*ante*) was in regard to £15 for masses to be offered for the happy repose of the testator's soul, to be apportioned in a particular manner between clergymen named in the will and the officiating clergymen of the city of Toronto; and, while it was held good as not being superstitious, the decision does not go so far as to say that it was a charitable use. There was no question of perpetuity. It was in effect a gift to those named clergymen individually of a definite sum, and so would be effectual quite apart from its being charitable or not charitable: *Bradshaw v. Jackman* (1887), 21 L.R. Ir. 12; *In re Clarke*, [1901] 2 Ch. 110; *In re Smith*, [1914] 1 Ch. 937; *Walker v. Murray* (1884), 5 O.R. 638.

The rule against perpetuities is indicated by Sir John Wickens, V.-C., in the leading case of *Cocks v. Manners* (1871), L.R. 12

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Eq. 574, in which he referred to *Carne v. Long* (1860), 2 De G. F. & J. 75, as deciding that a gift which the trustees could only give effect to by holding the property, which seemed to be all real estate, for ever, and applying the income according to the rules of the society, was void as being held on a perpetual trust. Byrne, J., in *In re Clarke* (*ante*), following *Cocks v. Manners*, states the test, or one of the tests, thus (p. 114): "Will the legacy, when paid, be subject to any trust which will prevent the existing members of the association from spending it as they please?" And the alternative in this way: "If it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad."

The right to dispose of the fund given, in any way the recipient might think fit, makes the gift a lawful disposition, and not tending to a perpetuity. This was the basis of the judgment in *In re Clarke* (*ante*), and is a recognised test, as appears from the remarks of the Lord Chancellor in *Carne v. Long* (*ante*).

In the case in hand, the trust upon which the residue is to be held is one, in my judgment, creating or tending to create a perpetuity; and, if the use is not a charitable one, it will be void.

The testator died in 1895, so that 55 Vict. ch. 20 (O.) and 43 Eliz. ch. 4 were then in force in this Province, the latter having been repealed only in 1902.

Under the Statute of Elizabeth the words "charitable uses" have a technical meaning, and include religious purposes for the instruction and edification of the public.

In Ireland a bequest for masses in perpetuity has been held to be charitable; *O'Hanlon v. Logue*, [1906] 1 I.R. 247; and counsel have urged that this should be followed here.

It is quite true that the Court that so decided was a very able one, consisting of the Lord Chancellor (Sir Samuel Walker), Chief Baron Palles, and FitzGibbon and Holmes, L.JJ. The case itself is the final development of a process of reasoning which had extended over many years, and appears in numerous reports. In it will be found all the learning that the most anxious student on the subject could desire. The outcome has been that a bequest for masses for the soul of an individual, whether cele-

brated in private or in public, and irrespective of whether or not the literal directions of the trust have been carried out, has been determined to be charitable, upon the sole ground that the mass, being an act of religion done by a minister of a church, is necessarily for the spiritual advantage of all the members of that church. The doctrine of the Roman Catholic Church on the subject is stated at length by Dr. Delaney in *Attorney-General v. Delaney* (1876) I.R. 10 C.L. 104, 107, and is summarised by Walker, C., in *O'Hanlon v. Logue*, at pp. 260 and 261.

Palles, C.B., in dealing with the will in that case, holds that if benefit can, according to the doctrines of the Church, be predicated, the use must in law be deemed charitable; and that, as I read it, is the dominating consideration leading the various members of the Court to the conclusion reached.

But the process of reasoning to which I have referred demonstrates that, in the practical result, the trust in question here, namely, to apply and expend the income for the saying of masses for the soul of the testator and his descendants for ever may be carried out by the celebration of a mass in private, irrespective of the presence of any congregation, in which service reference to the testator or his descendants' will depend wholly on the memory and mental intention of the celebrant, who, in a few years, would find it impossible to know who the descendants were for whom he was to pray.

I think this is such a refinement of the meaning and intent of the Statute of Elizabeth that I find it difficult to accept it as being in harmony with what is meant by "charitable use," according to decisions which have been followed for over sixty years in England, such as *West v. Shuttleworth*, 2 My. & K. 684, and *Heath v. Chapman* (1854), 2 Drew. 254.

The former judgment of Chief Baron Palles, in *Attorney-General v. Delaney* (*ante*), which he joined in overruling in 1906, states very clearly the objections to the conclusion reached in that year, and they are not met, in my judgment, by the later arguments.

I think that the three conditions stated by counsel for the heir at law in the *O'Hanlon* case, at p. 257, still apply to a charitable use in this Province: (1) it must be for the public or some section of the public: (2) it must be one as to which the Court can decide

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on legal evidence that it will confer the benefit on the public which the donor believed it would confer; and (3) it must be enforceable by the Court.

These conditions seem to be lost sight of in, or rather to be misinterpreted by, the views expressed in the *O'Hanlon* case. The authority, Co. Lit. 96 (b), referred to by Chief Baron Palles, as indicating that the Court can ascertain or direct the mental intention of the priest, only deals with the question of whether a certain known service was performed, a fact easily proved by the evidence of others.

I must, therefore, hold that the disposition of the residue of this estate does not constitute a charitable use, and leave it to some other Court to accept, if it will, the principles of the decision in *O'Hanlon v. Logue* as applicable to this Province.

Had I arrived at a different conclusion on this point, I should have considered the personalty as the only part of the residue applicable to the trust as declared.

It is unnecessary, in view of the foregoing, to deal with the further question as to whether St. Basil's Roman Catholic Church could take the gift. On the legal position of the Church, I have, since the hearing, been supplied with an affidavit from the Parish Priest, The Reverend Father Hayes. But the status of the donee of such a gift as this only needs to be considered when its constitution has to be examined in order to decide whether its objects are charitable or not. Here the disposition fails upon a different point.

An order will therefore go declaring that the disposition of the residue is ineffective as tending to create a perpetuity.

Costs of all parties out of the estate; and, following the excellent example of Younger, J., in a case analogous to this, *In re Hall-Dare*, [1916] 1 Ch. 272, I think these may all be paid as between solicitor and client.

[APPELLATE DIVISION.]

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July 6.

RYAN v. CANADIAN PACIFIC R.W. Co.

Negligence—Railway—Servant's Death while Uncoupling Cars—Unpacked Frog—Findings of Jury—Evidence—Failure to Connect Negligence Found with Death—Inferences—New Trial.

In an action for damages for the death of the plaintiff's husband by reason, as she alleged, of the negligence of the defendants, a railway company, his employers, while he was engaged in uncoupling cars, there was evidence, which the jury rejected, that the deceased had gone in voluntarily between the cars when the train was in motion; the jury found negligence causing the accident, namely, "frog not properly packed," and negatived contributory negligence, but did not indicate the connection between the negligence they found and the accident, as they were directed to do:—

Held, that the jury should have indicated how or why the want of packing was the cause of the death—there was a want of proper evidence of direct causal negligence and an absence of intelligible expression by the jury of what they thought was a reasonable inference, there being at least three explanations which might be accepted; and a new trial was ordered.

McArthur v. Dominion Cartridge Co., [1905] A.C. 72, distinguished.

An appeal by the defendants from the judgment of CLUTE, J., in favour of the plaintiff, the widow of Stephen Patrick Ryan, upon the findings of the jury at the trial, in an action to recover damages for his death, caused, as she alleged, by the negligence of the defendants.

The deceased was employed by the defendants, and, while engaged in uncoupling cars, his foot caught (it was said) in an unpacked frog, and he was thrown down and killed by the train.

The findings of the jury are set out below. Upon them, the trial Judge directed judgment to be entered for the plaintiff for \$7,000 and costs.

May 29. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley, K.C., and W. H. Williams, K.C., for the appellants, argued that the evidence shewed that the deceased had gone in voluntarily between the cars. The negligence found was not connected properly by the jury with the death, nor was the theory upon which they had evidently acted the only reasonable one. Direct causal negligence had not been shewn. All the recent cases were referred to in *Smith v. Grand Trunk R.W. Co.* (1914), 32 O.L.R. 380, including *Fawcett v. Canadian Pacific R.W. Co.* (1901-2), 8 B.C.R. 393, 32 S.C.R. 721, and *Cook v. Grand Trunk R.W. Co.* (1914), 31 O.L.R. 183.

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R. J. Byrnes, for the plaintiff, respondent, contended that the verdict of the jury should be upheld. There was no doubt on the evidence that the deceased must have stumbled and fallen between the cars. The defendants' negligence in not properly packing the frog was the proximate cause of the accident: *LeMay v. Canadian Pacific R.W. Co.* (1889-90), 18 O.R. 314, 17 A.R. 293; *Misener v. Michigan Central R.R. Co.* (1894), 24 O.R. 411. *Tilley*, in reply.

July 6. The judgment of the Court was delivered by HODGINS, J.A.:—The following are the questions put to the jury, and their answers:—

"1. Were the defendants guilty of negligence that caused the accident? A. Yes.

"2. If so, what was the negligence; explain fully? A. Frog not properly packed.

"3. Might the deceased Stephen Patrick Ryan have avoided the accident by the exercise of reasonable care? A. No.

"4. Did the deceased Stephen Patrick Ryan go between the cars when the train was in motion, backing, on the occasion in question? A. No.

"5. At what sum do you assess the damages? A. \$7,000."

In the charge of the learned trial Judge to the jury is found this paragraph: "It is charged that they were guilty of negligence because they did not have the frog properly packed. Was that the cause of the accident? Was the frog properly packed? If it was, that ends that part of it, and you would answer that question as to whether the defendants caused the accident by "No," because, if the frog was properly packed, that is the negligence that was charged. But, if you find that the frog was not properly packed, or, rather, that the defendants were guilty of negligence, then the next question is: 'If so, what was the negligence; explain fully?' That gives you the opportunity and the duty to explain fully why you think the company were guilty of negligence, if they were guilty. The charge is that the frog was not properly packed. If you found it was not, that would not necessarily entitle the plaintiff to succeed. Was the fact of its not being properly packed the cause of the accident? Explain fully there what you think about that, as to what was the negligence that caused the accident."

Previous to putting this to the jury, he had explained fully to them the evidence shewing that the deceased had voluntarily gone in between the cars as well as the contrary theory that he had stumbled and was thrown in between. The jury have found that the deceased was not guilty of contributory negligence.

In the absence of direct evidence as to the cause of the accident, where contributory negligence is negatived, the Privy Council in *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, upheld a verdict where there was no other reasonable explanation of the mishap than the one adopted by the jury.

Here there was evidence that the deceased had gone in voluntarily between the cars. This the jury reject. But what explanation do they adopt? In answering questions 1 and 2, in view of the learned Judge's charge, they were dealing with the frog alone and its packing, and entirely omitted to state or indicate how or why that want of packing was the cause of the deceased's death. There are explanations which might be accepted, if the direct evidence of what was seen is disbelieved, and these are: first, one which is most likely, that the deceased stumbled and fell in under the flat car, in front of the wheels, and was run over and killed; second, that he fell in and came in contact with the frog, which entangled him so that his death resulted from his being held fast; and, third, that he stumbled on the south wing of the frog after it branched out into the track to the south, and then fell in.

It is difficult to understand how, with the car moving with him in the same direction, a man stumbling and falling in could catch his foot in a frog, the jaws of which were away from him and opened wider as he progressed, or how, if he stumbled on the wing of the frog, blood was found on its point.

My strong impression from all the evidence is that the verdict was a sympathetic one, and that there was no reason for rejecting the evidence, as the jury evidently did, of the fellow-employees of the deceased who actually saw his latest actions.

But the negligence found is not linked up by the jury with the death, nor is the theory upon which they must have acted the only reasonable theory. Want of packing is consistent with liability or non-liability; and I think that the jury, having declined to accept the only evidence touching upon the vital issue, were

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bound to indicate the connection between the negligence they found and the accident, as they were directed to do. This duty should be insisted on in any case which, as here, presents features making it most difficult, in view of the non-acceptance of the statements of the only eye-witnesses, to draw a reasonable conclusion as to what else the deceased actually did. Strictly speaking, the result is that the respondent cannot hold her verdict. There is a want of proper evidence of direct causal negligence and absence of intelligible expression by the jury of what they thought was a reasonable inference.

I think there should be a new trial, and that the costs of the former trial should be in the cause and those of this appeal should be to the appellants in any event.

New trial ordered.

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[APPELLATE DIVISION.]

April 8.
July 6.

ST. MARY'S MILLING CO. V. TOWN OF ST. MARY'S.

Water—Mill-site—Riparian Rights—Dam—Raceway—Obstruction to Flow of Water—Trespass—Damages—Easement—Construction of Deeds—Severance of Tenement—Dominant and Servient Tenements.

The common grantor of the plaintiffs and defendants was the owner of a mill property upon the river Thames. His land included a portion of the bed of the river, subject to a reservation by the Crown of the bed of navigable waters. By means of a dam, a mill-pond was created, and a raceway was cut through the flats under the bank of the river. The conveyance to the plaintiffs was the earlier one; it included the mill property and two portions of the raceway—the upper part, comprising the intake, and the lower part, through which the mill was fed. The flats retained and afterwards conveyed to the defendants included part of the channel of the raceway, dependent as to the flow of water upon the upper part being kept open. The plaintiffs constructed a dam and placed obstructions at the head of the raceway and made a road leading to a street; these were removed by the defendants; and this action was brought, in respect of that trespass and other trespasses, for a declaration of right, an injunction, and damages:—

Held, reversing in this respect the judgment of CLUTE, J., the trial Judge, that the defendants were not entitled to the uninterrupted flow of the water through the raceway as it existed when the conveyance to the plaintiffs was made. In effect the right claimed by the defendants (a municipal corporation) was to have the water maintained as an aquatic play-ground for the public. The common grantor never used the raceway for the purposes of boating, but only for his mill; the right (if any) reserved when he conveyed to the plaintiffs must be determined by the use actually adopted before the grant; and the inference was, that he granted the easement or quasi-easement which the prior user indicated—the flow of the water for mill purposes—to the plaintiffs, if they chose to assert it; that being so, the grantees had the right to terminate the easement, which

they did by closing up both ends of the raceway. The raceway was not formed for the use of the portion retained, but for the mill property, and the severance was of such a nature as to indicate a destruction of the raceway so far as it formed a continuous and used channel. The portion of the land conveyed to the plaintiffs was the dominant tenement; and the defendants had no easement over or right in respect of it.

Review of the authorities.

Wheeldon v. Burrows (1879), 12 Ch. D. 31, and *Burrows v. Lang*, [1901] 2 Ch. 502, specially referred to.

Section 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, considered.

Held, by CLUTE, J., and not questioned upon the appeal from his judgment:

(1) that the property divided between the plaintiffs and defendants was, down to the giving of the conveyance to the plaintiffs, the entire property of the grantor; (2) that the waters upon the land were not navigable waters; (3) that there was no recognition by the plaintiffs or their predecessors in title of any right or claim by the defendants or the public to use the waters as of right for a pleasure-ground; (4) that the defendants were guilty of trespass except as to the removal of the dam and obstruction placed by the plaintiffs at the head of the raceway and the making of the road; (5) that the defendants had no riparian rights as to the raceway; (6) that the raceway was originally constructed and held for the benefit of the mill owned by the plaintiffs' predecessors in title; and (7) that the defendants were not entitled by way of an easement to the flow of water in the raceway, under sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75.

ACTION for a declaration of the plaintiffs' rights in respect of the waters of a river and for damages for trespasses committed by the defendants and for an injunction and other relief.

March 15. The action was tried by CLUTE, J., without a jury, at Goderich.

R. S. Robertson, for the plaintiffs.

F. H. Thompson, K.C., and *F. C. Richardson*, for the defendants.

April 8. CLUTE, J.:—The plaintiffs claim that they were the owners of the mills, lands, and premises in the statement of claim mentioned at the time of the trespasses complained of, and that their predecessors in title had been and the plaintiffs now are the owners of the said property, and of the bed of the river which passes through the same; that about seven years ago the plaintiffs' predecessors in title, then being the owners of the said lands, constructed a dam upon a portion of their lands at the place where Trout creek empties into the river Thames, and in connection with the execution of the said work made excavations upon other portions of their said lands immediately above the said dam, and the said dam has been ever since maintained by the plaintiffs and their predecessors in title for the purpose of developing power for use in the flour mill forming part

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of the property; that, during the year 1915, the plaintiffs erected a foot-bridge from the said dam across a portion of the plaintiffs' lands, which had been excavated as aforesaid, leading to another part of the plaintiffs' lands commonly known as the "flats," and had constructed a wire fence across their lands at the same place. The plaintiffs also claim that, prior to the commencement of this action and while the owners of the said lands, they constructed a roadway on a portion of the said lands across the lower end of an old head-race, to afford means of access to and from Water street, in the town of St. Mary's, to that portion of the plaintiffs' lands known as the "flats," and about the same time the plaintiffs also constructed upon the said lands, at a point near the top of the head-race, an embankment of cement, and a wire fence. The plaintiffs charge that in the month of July, 1915, the defendants wrongfully entered upon the plaintiffs' lands and forcibly removed the said wire fence and the roadway leading from the flats to Water street and the said cement embankment and wire fence at the head of the old tail-race; that subsequently and on the 20th August, 1915, the defendants wrongfully entered upon the said lands, by their servants and agents and workmen, and destroyed and removed the said foot-bridge constructed by the plaintiffs from the dam to the flats. The plaintiffs claim that all of the said acts were done with force and violence and with notice of the plaintiffs' title, and that the defendants have asserted the right to enter upon the said lands of the plaintiffs, as well as upon such portions of the plaintiffs' lands as are covered by water, and that the defendants deny the rights of the plaintiffs to the possession of the said property. The plaintiffs also charge that the defendants have erected and maintain a fence on the westerly side of Water street where the plaintiffs' lands abut the said street, and thereby deny and exclude the plaintiffs from access to Water street from the said lands; and further charge that the defendants will, unless restrained by the order of the Court, continue to enter upon the said lands of the plaintiffs and to interfere with the plaintiffs' possession and enjoyment thereof.

The plaintiffs claim: damages for the several trespasses complained of; a declaration that the plaintiffs are the owners of the said lands described in the statement of claim, and are

entitled to the possession, use, and enjoyment thereof without interference on the part of the defendants; an injunction to restrain the defendants from entering upon the said lands and interfering with the plaintiffs' possession, use, and enjoyment thereof, and from preventing the plaintiffs having access to their said lands from Water street; and other relief.

The defendants deny the allegations in the statement of claim, and expressly deny that the lands mentioned in the plaintiffs' statement of claim are owned by the plaintiffs. They deny all the alleged acts of trespass, and further say that, if they or any of them did enter on any of the lands described in the plaintiffs' statement of claim, which they do not admit but deny, the portions of the said lands so entered upon were covered by the waters of the river Thames and tributaries thereto and are navigable waters and are not owned or controlled by the plaintiffs, but are vested in the Crown, and no right of action arises to the plaintiffs in respect thereof; that, if the defendants or any of them destroyed or took down the roadway leading from the flats to Water street, the defendants say that the said roadway projected on to Water street, and that the plaintiffs thereby obstructed the highway on Water street, and that it was the duty of the defendants the Corporation of the Town of St. Mary's to remove the same; they deny that they removed the foot-bridge as complained of, and say that, if they did so, the same was not constructed on property which was owned by the plaintiffs or on which the plaintiffs have any rights; they deny all acts of violence or interference with any property belonging to the plaintiffs or which the plaintiffs have any right to maintain. The defendants the Corporation of the Town of St. Mary's further say that a large portion of the land described in the plaintiffs' statement of claim is covered by navigable waters of the river Thames and tributaries thereto which pass through the town of St. Mary's, and that the lands so covered by water are not owned by the plaintiffs, but are the property of and vested in the Crown, and that the said waters have been used for many years by the ratepayers of the town of St. Mary's as a pleasure-resort and for boating, and that anything done of which the plaintiffs complain was done to protect the ratepayers from the interference of the plaintiffs.

The defendants by way of counterclaim ask for a declaration of their rights in respect of the matters herein referred to.

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The following further defence was added at the trial: "8A. The defendants further say that the plaintiffs' claim to the lands and waters in question in this action, if the plaintiffs or their predecessors in title ever had a legal claim thereto, has been barred by section 35 of the Limitations Act."

The plaintiffs' title is through the Canada Company, to which company and their successors in title were granted by the Crown on the 1st day of August, 1839, lots numbers 15, 16, 17, 18, 19, 20, 21, and 22 in the 17th, 18th, and 19th concessions of the township of Blanchard, in the county of Huron, in the district of London, in the Province of Upper Canada, "reserving nevertheless to the Crown all navigable streams, waters and watercourses, with the beds and banks thereof running, flowing, or passing in, over, upon, by, through, or along any of the said parcels of land." It will be noticed that this grant, while it includes the lands claimed by the plaintiffs, does not cover the beds of the streams.

On the 11th July, 1840, a further grant was obtained from the Crown to the Canada Company, including the lands in question, "together with all woods and waters thereon lying and being under the reservations, limitations, and conditions hereinafter expressed, to have and to hold the said several parcels or tracts of land (covered with water) hereby given and granted to the said Canada Company and their assigns for ever, saving and reserving to Us, Our Heirs and Successors, all mines of gold and silver that shall or may be hereafter found on any part of the said parcels or tracts of land (covered with water) hereby given and granted as aforesaid: Provided always and it is Our Royal will and pleasure that if any part or portion, parts or portions, of the said land (covered with water) hereby granted as aforesaid, shall be the bed of navigable waters, then as to such part or portion, parts or portions, this Our said grant and every matter and thing herein contained shall be null and void, and We, Our Heirs and Successors, shall be and shall be deemed and taken to be seized of such part or portion, parts or portions, of land (covered with water) heretofore described, as shall be the bed of any navigable waters, as fully and effectually, to all intents and purposes whatsoever, as if the same had never been granted as aforesaid."

A reservation is also made of any portions of land covered with water that shall be required for canals or any other purposes

connected with the defence or security of the Province, in which case the land shall revert to and become vested in the Crown, upon payment of the price as found by arbitrators as therein provided.

By virtue of these grants, and all subsequent grants by the plaintiffs' predecessors in title, I find that the lands described in the statement of claim passed from the original grantees to the plaintiffs and are now owned by the plaintiffs, including the bed of the river Thames, subject only to the reservation contained in the grant of the 11th July, 1840, which reserves the bed of navigable waters to the Crown. I further find that the said river, where it passes through the plaintiffs' lands and above the same, and for a long distance below the said lands, was not, at the time of the said grant, and had not been since and is not now, navigable waters within the said grant. This appears clearly from the evidence, and was not seriously controverted by counsel for the defence.

At least more than sixty years ago, what is called on plan exhibit 10 "the original dam" was built, and created a pond above the said dam upon which row-boats could navigate. From that early period a head-race was cut through the "flats" down to a point where it met Trout creek to the south, and there is evidence that row-boats were used upon this mill-race passing up and down into the pond and into Trout creek and for a short distance up the same.

About seven years ago, a new dam was erected, a little below the outlet of the mill-race, near the mouth of Trout creek; and the land to the east of the river Thames, as shewn on plan exhibit 10, was excavated and used for an embankment, the area being marked "water area due to dam," with the result that the mill-pond now extends from this newly erected dam back to and including the former mill-pond, the dam being raised to the same elevation as the former dam. This gave a larger area upon which row-boats, and more recently small motor-boats, might be used. There were several small boat-houses built along the tail-race for the convenience of their owners, and also a few along Trout creek. There was also a club-house built, with the permission of the plaintiffs and predecessors in title, where a number of boats were kept and used for boating.

So far as I could learn from the evidence, until the defendants set up a claim of right and disputed the plaintiffs' title, the

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plaintiffs acted in a generous way by permitting, without fee or any charge, the public to use the mill-pond for boating; but there never was any recognition in any way by the plaintiffs or their predecessors in title of any right or claim by the defendants or by the public to use the said waters as of right for a pleasure-ground.

The defendant Coupland was Mayor of the Town of St. Mary's during 1915, and the defendant Sheldon was one of the Councilmen. From the various resolutions passed by the Council, and from the acts of the defendants, it is clear that the defendants, besides denying the title of the plaintiffs, claimed the right to use the waters covering the land owned by the plaintiffs as of right, and in pursuance of that claim used force and violence in supporting it, entering upon the plaintiffs' lands and destroying the bridge, road, and fences which the plaintiffs had made and erected as owners upon the said lands. In all these acts, except as to the removing of the cement dam and obstruction placed by the plaintiffs at the head of the tail-race and the making of the road leading to Water street, to which I shall refer later, the defendants, I find, were guilty of trespass, and the plaintiffs were put to considerable damage in trying to defend their rights from such trespass. I do not think I should be justified in allowing them the full amount paid to watchmen, and I assess the damages at \$200.

With respect to the obstruction placed by the plaintiffs at the head of the mill-race and filling in of the race in making a road to connect with Water street, different considerations arise.

The part marked green on plan 10 shews the portion of the flats which originally formed a part of the mill property owned by the plaintiffs' predecessors in title, but which recently has passed to the Town of St. Mary's, who now own the same. It will be seen that these lands front on and include the tail-race for nearly its whole length. The question is raised as to whether the artificial stream called herein the mill-race gives, as such, riparian rights to the present owners, the Town of St. Mary's.

In Halsbury's Laws of England, vol. 28, para. 838, the law in regard to the right of a riparian owner is thus stated: "Every riparian owner on a natural watercourse flowing in a known and

defined channel, whether on the surface of the land or below it, or in an artificial channel of a permanent character, has as incident to his property in the riparian land a proprietary right to have the water flow to him in its natural state in flow, quantity, and quality, neither increased nor diminished, whether he has yet made use of it or not. He has also the right that the water shall go from his lands without obstruction, and he is entitled to make certain uses of the water which comes to him whilst it is on his property." It has been held that this means the owner of land in actual contact with the watercourse. As to the meaning of "actual contact" see *Attorney-General v. Rowley Brothers and Oxley* (1910), 75 J.P. 81.

In *Baily & Co. v. Clark Son & Morland*, [1902] 1 Ch. 649, the judgment proceeded upon the basis that the stream there in question was an artificial watercourse. Vaughan Williams, L.J., said (p. 664) that "the basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs. This being so, it is plain that the circumstances might be such as properly to lead to the inference that the watercourse was originally constructed on the terms that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream would have, and no more; and reference is made to *Sutcliffe v. Booth* (1863), 32 L.J.Q.B. 136, as an authority for that proposition. Stirling, L.J., pointed out (p. 667) that the watercourse in question was an ancient watercourse, having been in existence at least 400 years. See also *Wood v. Waud* (1849), 3 Ex. 748, and *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 App. Cas. 121.

The judgment of the Privy Council in this last case was delivered by Sir Montague E. Smith, who pointed out (p. 126) that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. "In the former case each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the

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water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin." He then points out that, although it was held by the Court of King's Bench in the case of *Magor v. Chadwick* (1840), 11 A. & E. 571, 586, that it was no misdirection to tell the jury "that the law of watercourses is the same, whether natural or artificial," it was held in a subsequent case, *Wood v. Waud*, 3 Ex. 748, that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. "On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable." He then approves what was said by the Court in *Wood v. Waud*: "We entirely concur with Lord Denman, C.J., that 'the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variations."

In the case of *Greatrex v. Hayward* (1853), 8 Ex. 291, 292, decided shortly after *Wood v. Waud*, Baron Parke thus states the principle: "The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created." And in that case he held that no right had been acquired by enjoyment of twenty years, and that the watercourse was of a temporary nature only.

In *Sutcliffe v. Booth*, 32 L.J.Q.B. 136, the Court of Queen's Bench directed a new trial where the learned Judge who tried the case directed the jury to the effect that if the stream was an artificial one no right whatever could have been acquired in it. The Court held that the direction was incorrect, "because, although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream."

In *Burrows v. Lang*, [1901] 2 Ch. 502, the owner of an ancient mill and a farm, the cattle whereof were to some extent watered from an ancient watercourse diverted from a natural stream, and running on the mill property alongside the farm, but constructed and maintained solely for the purpose of the mill, conveyed the farm to a purchaser without mentioning any water right; and it was held that, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the purchaser had acquired no right, either by implied grant or under the general words of the Conveyancing Act, to have it continued for his benefit, and the watercourse being therefore precarious, he could have no right to the use of the water (if any) therein. *Birmingham Dudley and District Banking Co. v. Ross* (1888), 38 Ch.D. 295, followed and applied.

Burrows v. Lang was distinguished in *Whitmores (Edenbridge) Limited v. Stanford*, [1909] 1 Ch. 427, and *Baily & Co. v. Clark Son & Morland* followed.

In the *Whitmores Limited* case, the plaintiffs were the owners in fee of an ancient tannery situated on either bank of a mill-stream, and the defendants were the occupiers of an ancient corn-mill further down the stream. The channel of the stream was an artificial one, constructed several centuries ago, and passing through the lands of various proprietors before reaching the tannery and the mill. The owners of the mill owned and controlled the sluice-gates across the river at the point where the mill-stream commenced, and they regulated the flow of the water into the mill-stream. The defendants cut off the water supply, and, entering on the bed of the river within the plaintiffs' premises, removed certain pipes by means of which the plaintiffs had been

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in the habit of obtaining water for their tannery. In an action by the plaintiffs for an injunction to restrain the interference with their right to abstract water, and for trespass and damages, it was held, having regard especially to the notorious and constant user of the water by the plaintiffs and their predecessors in title for nearly 250 years, that the plaintiffs were the owners of the bed of the stream so far as it ran through their land, and that the Court was bound to infer that the mill-stream was originally constructed for the mutual benefit of the tanner and the miller, and that the plaintiffs were entitled, under a reservation made or agreement entered into when the channel was constructed, to a right to the use of the water for all reasonable purposes, not causing any sensible or material injury to the miller. See also *Arkwright v. Gell* (1839), 5 M. & W. 203. It is also pointed out in the *Whitmores Limited* case, by Eve, J. (p. 436), that *Burrows v. Lang* establishes this proposition, that if the plaintiffs have no right to have the flow continued, they cannot claim as an easement the right to extract water, if and when it is flowing in the stream. Farwell, J., deals with such a claim where he says in *Burrows v. Lang*, [1901] 2 Ch. at p. 510: "To my mind that is a claim which is inconsistent with the very idea of the nature of an easement."

In Halsbury's Laws of England, vol. 11, p. 315, para. 613, it is said: "There is no natural right to water in an artificial watercourse." (*Kensit v. Great Eastern R.W. Co.* (1884), 27 Ch.D. 122, 133, 134, C.A., is cited for this.) "But a watercourse, though artificial in its nature, may have been originally made under such circumstances, and have been so used, as to give the persons through whose land it flows all the rights which they would have had as riparian owners had the stream in fact been a natural one." Reference is made to the cases above cited and also to *Nuttall v. Bracewell* (1886), L.R. 2 Ex. 1.

In that case the effect of the decision is that a riparian land-owner can grant to a non-riparian land-owner the flow of water from the stream to his premises for the use of the premises, and that the grantee may sue for a disturbance of his enjoyment by a higher riparian owner.

In the present case, there was no evidence as to the exact date when the mill-race was first constructed. It was probably sixty-five or seventy years ago, but there can be no doubt from

the evidence, and I find as a fact, that it was so constructed for the benefit of the mill owned by the plaintiffs' predecessors in title. That ownership has continued down to the present time, and until the conveyance to the Town of St. Mary's of the portion of land marked green on plan 10, the mill property and the lands so purchased by the Town of St. Mary's were held by the plaintiffs' predecessors in title as an entire property. In my opinion, the Town of St. Mary's cannot claim as for a riparian right—but must claim under the grant which includes the mill-race.

The plaintiffs' present title came by a conveyance from the Title and Trust Company, the liquidator of G. Carter Son & Company Limited, who thus held the whole property as owners. By deed dated the 30th day of June, 1914, from the Title and Trust Company to the plaintiffs, the liquidator of the estate conveyed to the plaintiffs the lands now claimed by them. An examination of the description of the lands so conveyed with plan 10, shewing the boundaries of the same, clearly shews that the description does not include any part of the raceway except a small portion thereof at the head of the race and a small portion at the foot of the raceway.

By deed dated the 14th June, 1915, there was conveyed to the defendants from the Town of St. Mary's what is known as the "flats," which includes all the mill-race "to the easterly bank" and the lands thereunder, excepting the small portions at the head and foot of the race before mentioned.

It will thus be seen that the common owner assumed to divide and did divide the property so as to cut across the mill-race. At this time the new dam was in existence. The water flowed freely down the mill-race. The plaintiffs and the Town of St. Mary's thus claim under a common title, the plaintiffs being prior in point of time. The question is, then, whether the grantor of the plaintiffs, by his deed to the plaintiffs of the property which they now claim, granted such exclusive right to the land and waters thereon covered by the deed as to entitle them to obstruct and dam the tail-race and prevent the waters from flowing down the same, and so change the condition of the premises that had existed for over sixty years. I do not think that the plaintiffs received any such right; the presumption, in my view, is

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the other way; that is, that, having sold a certain portion of land which cut the tail-race, it was obviously intended, while giving to the plaintiffs the rights provided by the deed, that it ought not to be presumed that it gave any right in respect to the tail-race not stated in the deed. The watercourse existed at the time, and had existed for a long term of years, and the conveyance of a part thereof gave no right to obstruct the flow in respect of the balance. In *Burrows v. Lang*, the watercourse lay entirely on the mill property; here it is on the defendants' property.

For the reasons indicated why the plaintiffs have no right to block the entrance to the canal, they have, in my opinion, no right to block the flow of water from the tail-race; and therefore had no right to fill in and build a bridge across the tail-race to connect their lands with Water street: 'Coulson & Forbes' Law of Waters, 3rd ed., pp. 288, 289; Gale's Law of Easements, 8th ed., p. 296; *Roberts v. Richards* (1881), 51 L.J. Ch. 944 (C.A.)

In other words, the plaintiffs and the Town of St. Mary's were entitled to the waters and the land under the waters as it existed at the time they received their respective grants. The plaintiffs had, in my opinion, no right whatever to block up or in any way interfere with the free flow of the water down and through the tail-race as it existed at the time of the grant to the Town of St. Mary's.

It is admitted that the plaintiffs did form a sort of dam or obstruction by sinking bags of cement near the head of the mill-race and just above the point where the waters thereof enter and pass by the defendants' lands, and also obstructed the mill-race by building a roadway across it. One complaint made by the plaintiffs is that the defendants entered and removed these obstructions. I find that the plaintiffs were wrong in making such obstructions, and the defendants had the right to have the same removed, and I allow the defendants \$40 for removing the said obstructions.

I do not think it possible to support the defendants' claim to an easement under sec. 35 of the Limitations Act. None of the defendants can pretend to have exercised anything in the nature of an easement over these waters or for the period specified; there was no dominant tenement. In the last few years a few of the people of St. Mary's have used these waters for pleasure,

but until within the last two or three years such user as there was was not as of right.

A plan was put in, the authorship of which was not very clear, shewing a tow-path 33 feet wide along certain portions of the Thames. I think this was wholly inadequate to establish any right or title thereto in the defendants.

The result is that the plaintiffs are entitled to succeed upon the main issue, and are entitled to a declaration that they are the owners of the lands in the statement of claim mentioned and described, and are entitled to the possession, use, and enjoyment thereof without interference on the part of the defendants; they are further entitled to an injunction to restrain the defendants from entering on the said lands and from interfering with the possession, use, and enjoyment thereof by the plaintiffs.

The plaintiffs are entitled to damages for the wrongful trespass aforesaid, which I assess at \$200. I find that the defendants the Town of St. Mary's are entitled to the flow of the water through the raceway, unimpeded, and to damages for the obstructions thereof by the plaintiffs, which I assess at \$40, which may be deducted from the damages allowed to the plaintiffs and to an injunction restraining the plaintiffs from obstructing the same. The plaintiffs are entitled to the general costs of the action, and the defendants are entitled to such proportion of their costs as is incident to the findings in their favour.

The judgment, as entered, adjudged and declared as follows:—

1. That the plaintiffs are the owners of the lands in the statement of claim mentioned and described and are entitled to the possession, use, and enjoyment thereof, without interference on the part of the defendants.

2. That the defendants, their servants, agents, and workmen, be and they are hereby enjoined and restrained from entering on the said lands and from interfering with the possession, use, and enjoyment thereof by the plaintiffs.

3 That the plaintiffs recover from the defendants \$200 damages.

4. That the defendants the Corporation of the Town of St. Mary's are entitled to the unimpeded flow of water through the raceway conveyed to the said defendants by the liquidator of the G. Carter & Company Limited.

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5. That the plaintiffs, their servants, agents, and workmen, be and they are hereby enjoined and restrained from obstructing the flow of the water through said raceway.

6. That the defendants the Corporation of the Town of St. Mary's recover from the plaintiffs \$40 damages for the obstruction of said raceway by the plaintiffs, the said sum to be deducted from the sum of \$200 awarded the plaintiffs for damages.

7. That the plaintiffs recover from the defendants their costs of this action, except any costs specially relating to the matters in respect of which the defendants have succeeded, and that the defendants recover from the plaintiffs such proportion of their costs as is incidental to the matters in respect of which the defendants have succeeded.

The plaintiffs appealed from the judgment of CLUTE, J.

June 16. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Robertson, for the appellants, argued that the defendants had no riparian rights in the mill-race, which was an artificial and temporary stream. In such a case any riparian rights would have to be based on an agreement or grant, but there was none such here: *Baily & Co. v. Clark Son & Morland*, [1902] 1 Ch. 649; *Sutcliffe v. Booth*, 32 L.J.Q.B. 136; *Wood v. Waud*, 3 Ex. 748; *Burrows v. Lang*, [1901] 2 Ch. 502; *Whitmores (Edenbridge) Limited v. Stanford*, [1909] 1 Ch. 427. The head-race had no value as a watercourse. It was obsolete so far as use for water power is concerned, and it never had any other use. The defendants had never set up any such right as that declared by the learned trial Judge, and no evidence had been given by which it could be sustained. The flow of water down the old head-race had always been subject to interruption and changes to suit the purposes of the owners of the mill and dam, and it was an interference with the plaintiffs' water power to enjoin them from interfering with the flow of water in the old head-race. The plaintiffs in obstructing the head-race did so upon their own lands, and to deny them the right to do so was to derogate from the grant made to them by the former owner of the lands in question: *Attrill v. Platt* (1884), 10 S.C.R. 425; *McClellan v. Powassan Lumber Co.* (1908-9), 17 O.L.R. 32, 42 S.C.R. 249.

F. H. Thompson, K.C., and *F. C. Richardson*, for the defendants, respondents, contended that they were setting up not an easement, but a quasi-easement, in respect to the right which they claimed, to have the flow of water in the mill-race maintained: *Goddard's Law of Easements*, 7th ed., pp. 128, 129; *Arkwright v. Gell*, 5 M. & W. 203; *Grand Hotel Co. v. Cross* (1879), 44 U.C.R. 153; *Warin v. London and Canadian Loan and Agency Co.* (1885), 7 O.R. 706; *Plummer v. Davies* (1911), 3 O.W.N. 466. The appellants and respondents were, by virtue of their respective conveyances, entitled to the water and the land under the water as it existed at the time they received their respective grants: *Conveyancing and Law of Property Act*, R.S.O. 1914, ch. 109, sec. 15.

Robertson, in reply, said that the quasi-easement contended for on behalf of the defendants was a claim in gross, and there could not be any such right: *Warin v. London and Canadian Loan and Agency Co.*, 7 O.R. 706. The damages awarded the plaintiffs should be increased by the amount expended in filling in and protecting the old head-race.

July 6. HODGINS, J.A.:—Action tried by Clute, J. His judgment was mainly in favour of the appellants, who, however, contend that it did not go far enough, inasmuch as he allowed only \$200 for damages for trespass, and object that he construed the deed to the appellants as if it had been subject to a reservation which enables the respondents to insist on the uninterrupted flow of the waters through the raceway in question as it existed when the deed to the appellants was given.

The learned trial Judge has held: (1) that the property now divided between the appellants and the respondents was held, down to the giving of the deed to the appellants, which was prior to that of the respondents, by the appellants' predecessor in title as an entire property; (2) that the waters upon the lands were not navigable waters; (3) that there was not any recognition by the appellants or their predecessors in title of any right or claim by the respondents or the public to use the said waters as of right for a pleasure-ground; (4) that the respondents were guilty of trespass except as to removing the cement dam and obstruction placed by the appellants at the head of the raceway and the

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making of the road leading to Water street; (5) that the respondents have no riparian rights as to the raceway; (6) that the raceway was originally constructed and held for the benefit of the mill owned by the appellants' predecessors in title; and (7) that the respondents cannot claim to be entitled by way of an easement to the flow of water in the raceway, under sec. 35 of the Limitations Act, R.S.O. 1914, ch. 75.

These findings are not contested by the respondents, who rely upon the ground taken by the learned trial Judge, i.e., that the appellants and respondents are, by virtue of their respective conveyances, entitled to the water and the land under the water as it existed at the time they received their respective grants; and that, in consequence, the respondents have the right to the water in the raceway unimpeded by the appellants. This means that the appellants' lands became a servient tenement so far as to allow the free passage of the water over them to reach the raceway.

The first difficulty is to know just what the right claimed really is. The respondents in this case do not claim the right to take water, nor indeed to have it flow past their lands, except so far as is necessary to keep it there, so that it can be used for purposes of recreation. It is in effect a claim to have the water kept and maintained as an aquatic play-ground for the public. While the people of a district can acquire in England and Ireland by dedication or custom certain rights, such as the user for purposes of recreation, over land which cannot be gained by the general public (see *Edwards v. Jenkins*, [1896] 1 Ch. 308, and *Abercromby v. Fermoy Town Commissioners*, [1900] 1 I.R. 302), no such case is suggested here. The language of the Lord Chancellor in *Attorney-General v. Chambers* (1859), 4 DeG. & J. 55, 65, in dealing with the claim of a party who had turned his cattle out upon a marsh which crossed the invisible line of boundary which separated the marsh from the sea, is applicable to the circumstances of this case: "Where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right."

The learned trial Judge says that, while the appellants acted in a generous way in permitting boating on their raceway and pond,

there never was any recognition of any right so to do existing either in the respondents or in the public.

In *Warin v. London and Canadian Loan and Agency Co.*, 7 O.R. 706, Wilson, C.J. (p. 722), describes the claim asserted by reason of long continued user of water in bringing in and anchoring vessels in it, in this way: "The claim which is set up by the defendants is not properly an easement, but a claim in gross of what is equivalent to a right of way over the plaintiffs' waters, and there cannot be such a right."

The common owner never used the raceway for the purposes of recreation or boating. He utilised the water and its flow only for his mill. So that, if the right is not known to the law, such as the right claimed here to paddle canoes over it, it cannot be enforced: *Burrows v. Lang*, [1901] 2 Ch. 502.

But it is said that, if the water cannot be claimed for the purposes of amusement by the inhabitants of St. Mary's, or that select portion of them whom the pleader terms "ratepayers," yet the right to the flow of the water or its maintenance in the raceway may be asserted.

It is this easement or quasi-easement, which latter term Mr. Thompson adopted as a correct description of the respondents' alleged right, which is now insisted on, and which has been allowed by the learned trial Judge. A quasi-easement is a user in a particular way by the common owner, and this may be the subject of a grant or reservation if it is a right known to the law. This I take to be the effect of *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165; because the general words of the English Conveyancing Act, 1881, can only carry a legal right: *Lewis v. Meredith*, [1913] 1 Ch. 571.

But the right granted or reserved under such circumstances must be determined by the use actually adopted before the grant is made. Here the use, when the grant to the appellants was given, was the flow of the water down to and for the purposes of the mill. And, in view of the accepted findings of the learned trial Judge, the question is really narrowed to this point: Was the use, in the sense I have mentioned, reserved by the grantor when the deed to the appellants was given, or did that deed carry with it the right to an easement over the remaining lands, which the appellants put an end to when they voluntarily filled in the raceway at either end?

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It must be remembered that at the time of the grant to the appellants the milling company had failed and gone into liquidation. The sale to the appellants was of the mill property and of two portions of the raceway only: the upper part, comprising the intake, and the lower part, through which the mill was fed. The flats retained included part of the channel of the raceway, which would be dependent as to flow upon the upper part being kept open.

The continuous raceway became in that way severed; and, if the then use of the channel for water to the mill was to be maintained, the part retained by the grantor would of necessity be the servient tenement, having regard to that use. The deed of the appellants is carefully drawn, and contains reservations as to drainage rights through the flats. The situation then would rather lead to the inference that the grantor by virtue of his deed granted the easement or quasi-easement which the prior user indicated, i.e., to the flow of the water for mill purposes to the appellants if they chose to assert it: *Edinburgh Life Assurance Co. v. Barnhart* (1866), 17 U.C.C.P. 63; *Roe v. Siddons* (1888), 22 Q.B.D. 224. But, if that were so, the grantee had the right to terminate the easement: *Oliver v. Lockie* (1894), 26 O.R. 28. This he has done by closing up both ends of the raceway by permanent structures.

In considering whether the other view is to prevail, namely, that the grantor reserved for his own benefit the right to the flow of the water through the raceway, it is well to bear in mind what is stated by Vaughan Williams, L.J., in *Baily & Co. v. Clark Son & Morland*, [1902] 1 Ch. 649: "If, on the other hand, this is an artificial watercourse, any right to the flow of the water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs" (pp. 663, 664).

Any reservation by the grantor is therefore in the nature of a re-grant by the grantee. And it is evident that such a re-grant would, in this case, burden the grantee with the duty of keeping the raceway open at both ends, with all the labour and expense of repair and maintenance for all time, and that for a

purpose not consonant with the working of the mill, but merely for the occasional use of the water in the raceway for pleasure or other objects not then defined.

The grantor was the liquidator of an insolvent company, who was not likely to ask or expect that a purchaser of the mill property, to whom he sold both ends of the raceway, would burden himself for all time with the expense of keeping open and maintaining a raceway for the purpose of some undefined and probably then unanticipated public benefit. The flats were not then owned by the respondents, and it would have needed some prescience to have foreseen that the respondents would buy, and, having bought, would provide for their "ratepayers" an aquatic park.

On the other point, as to whether such a reservation can be implied, there are in *Wheeldon v. Burrows* (1879), 12 Ch.D. 31 (stated by Mr. Gale to be now settled law and followed by our Court of Appeal in *McClellan v. Powassan Lumber Co.*, 17 O.L.R. 32), two rules laid down by the Court in the following terms (by Thesiger, L.J., 12 Ch.D. at p. 49): "The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second . . . is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity." After reviewing various cases, the learned Lord Justice said (pp. 58, 59): "These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed

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during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land."

Stirling, L.J., in *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, at p. 573, says: "In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property."

An easement or right of enjoyment such as is claimed in this case cannot, in any sense, be one either actually necessary or necessary for the reasonable use of the property retained. The flats do not require for their enjoyment a watercourse beside them for boating or other like purposes, nor can any other useful end be suggested in support of the claim. In the case last cited, the almost indispensable advantages of tie-rods necessary to support a dock were held to fall short of an easement of necessity in a legal sense.

The case of *Burrows v. Lang*, [1901] 2 Ch. 502, contains much that is apposite to the question in hand. The common owner first conveyed the farm to the plaintiff. He retained the mill property for seven years, and presumably for that length of time he maintained the water in the artificial watercourse out of which the plaintiff's cattle drank from time to time. Then he conveyed to the mill-owner the mill property through which the artificial watercourse ran. In the present case the common owner deeded the mill property first, retaining part of the raceway. Farwell, J., says (p. 508): "If a man makes a watercourse leading water to a mill-pond for the use of his own mill on his own land, that is a temporary purpose, as it is limited to the period for which he uses the mill."

Here, when the common owner parted with the mill and with sections of the raceway—one of which was its inlet and the other its outlet—it may be concluded, as I have pointed out, that the grantor, the liquidator, had no idea of imposing upon the purchaser, in favour of himself, the burden the extent of which I have already indicated, for the mere purpose of allowing it to be used as a possible recreation-ground by members of the public, whose claims up to that time, the learned trial Judge finds, had

never been recognised, or because he conceived it to be something of value to old and unused flats.

The opposite conclusion has practically been drawn in the judgment appealed from, although the probable easement over the respondents' land is not dealt with. But, if an owner of land, through which a raceway ran, grants to another, part of the lands necessary for the existence of the raceway, without reserving any right to its continuance thereon, the more natural presumption would be, it seems to me, that he had intended to part with it both as to the lands which carried the flow of water and as to the right to that flow as well. If, on the severance of two tenements, there is an actual way over one to the other, used and obviously formed for the other, such a way will pass by implied grant: *Brown v. Alabaster* (1887), 37 Ch.D. 490.

But the raceway here was not formed for the use of the portion retained, but for the mill property, and the severance was of such a nature as to indicate, not an implied grant, but a destruction of the raceway so far as it formed a continuous and used channel. I do not see that the statute, the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 15, helps or affects the matter at all. It provides that every conveyance of land shall include all ditches, waters, watercourses, privileges, easements, and appurtenances whatsoever "to such land belonging or in any wise appertaining," or with the same "used, occupied and enjoyed or taken or known as part or parcel thereof;" and if the same purports to convey an estate in fee simple, then it will carry also "all the estate, right, title, interest . . . use . . . property, profit, possession, claim and demand whatsoever, of the grantor, into, out of, or upon the same land, and every part and parcel thereof, with their and every of their appurtenances."

If these words indicate anything, they would compel the conclusion that everything that the grantor had, passed by the appellants' deed to them as grantees. If it is the proper conclusion that the flow of water in the raceway is included in the words "appertaining," "used and enjoyed," or "appurtenances," then the claim to the grant of the easement to flow over the reserved lands would be established. But I do not think the appellants need to rely solely on the statute.

At the time the respondents' deed was given, the lands in it were subject either to an easement in favour of the lands already

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granted, which the grantee in that deed might at any time abandon, and which he could not be compelled to continue, or no such easement existed, and both parcels were conveyed merely as so much land then covered as to part by water.

If the former was the true situation, as I think it was, then there was nothing for the words in the Act to cover in favour of the respondents. If the latter, then I think it is impossible to include in the deed to the respondents any easement or right in relation to the watercourse. The actual use was for mill purposes, and the enjoyment of the flow of water in the raceway was for that alone, and not for the benefit of the flats, to which it was not an appurtenance; while the suggested public right is negatived by the findings made by the trial Judge.

To give any other construction to these two deeds would present the anomaly of rendering the land in the earlier one the servient tenement, while it was in fact dominant, for that fact must be determined by the use to which the raceway was actually put at the time of the severance.

The right to construct the sewers and drains in addition to the one specially mentioned, which is reserved in the first conveyance, does not help the respondents. The raceway opposite the flats belongs to the respondents; and it would follow that, if they drained into it, they would be bound to construct a drain or sewer therein, as by the deed they are required to do in such a manner as to cause the least possible interference with the rights of the appellants. This, or the municipal sanitary regulation, would prevent them treating the raceway as an open sewer; they must construct their drains and sewers in the ordinary way; and in any case what they may do in that direction has no bearing upon the right to the flow or stoppage of the water before they exercise their drainage rights. They can put those in force whether the water flows opposite their lands or not.

On the whole, the appeal should be allowed, and the judgment varied by striking out paragraphs 4, 5, and 6 thereof and all the words after "of this action" in paragraph 7.

The damages allowed should not be interfered with.

The respondents should pay the costs of the appeal.

GARROW, J.A., concurred.

MACLAREN, J.A., agreed in the result.

MAGEE, J.A.:—I agree with the reasons and conclusion of my brother Hodgins. At the argument here, allusion was made by counsel for the defendants to the fact of a small natural stream running into the mill-race in question, and it was thought that the race followed the course of that stream. That might change the whole complexion of the case, but the only reference I find in the evidence to it is a statement by Mr. Johnson, witness for the plaintiffs, when speaking of the mill-race being obstructed; he says: "The water would stand there. Q. But there is nothing else to feed it? A. Yes, there is a small creek. Q. It would have no outlet at the lower end? A. It would raise and go over it." There the matter dropped, and there is nothing to shew whether that creek would enter on the plaintiffs' or defendants' land, or whether it would cross the race. The statement as to it is insufficient to help the defendants, and the plans put in as exhibits do not indicate any such stream.

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Appeal allowed.

[APPELLATE DIVISION.]

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May 5.
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Will—Trust—Bequest of Income—Royalties upon Sales of Books—Apportionment between Capital and Income—Unmarketed Company-shares—Apportionment of Proceeds when Sale Effected.

A testator, after making provision for his wife, gave her a general power of appointment over his whole estate. He died in 1898; and his widow, dying in 1899, by her will, in the exercise of the power of appointment, directed the executors of her husband to transfer the estate to trustees upon trust, "to set apart and invest the residue of the said estate and to pay the income and interest thereof to" her two sisters, and upon their death to deal with the residue in the way pointed out by the will. The testator was the author of certain books which had been copyrighted. Under agreements made by him with publishers, royalties were payable to him and his estate from time to time upon sales made. The trustees received these royalties for fifteen years, and treated them as capital, paying the income to the sisters:—

Held, by MIDDLETON, J., upon an originating notice, that the amounts so received should be apportioned between capital and income in the proportion that capital would bear to an assumed income at five per cent., with yearly rests, from the testator's death.

The rule in *In re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643, applied.

Davidson's Trustees v. Ogilvie, [1910] Sess. Cas. 294, not followed.

Upon appeal, a Court composed of four Judges was divided in opinion upon the question of the application of the rule to the royalty payments, and the judgment of MIDDLETON, J., stood as if affirmed.

The same rule was applied by MIDDLETON, J., as to the division of the proceeds (when realised) of company-shares not sold but retained by the trustees because not at the time marketable; and this was affirmed by the appellate Court.

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MOTION upon originating notice for an order determining questions arising in regard to the estates of Thomas Kirkland, deceased, and of his wife, Jane Todd Kirkland, deceased, in reference to the provisions of their respective wills.

May 5. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

J. Gilchrist, for the life-tenants, the applicants.

Hamilton Cassels, K.C., for the Toronto General Trusts Corporation, the trustees under the will of Jane Todd Kirkland.

G. H. Gray, for the adult remaindermen.

E. C. Cattanach, for the Official Guardian, representing the infant remaindermen.

May 5. MIDDLETON, J.:—The testator Thomas Kirkland died on the 31st December, 1898, and by his will, after making provision for his wife, gave her a general power of appointment over his whole estate.

In pursuance of this power, the widow, who died on the 3rd October, 1899, directed the executors of her husband's estate to transfer it to the Toronto General Trusts Corporation upon trust, as to the residue, "to set apart and invest the residue of the said estate and to pay the income and interest thereof to" Mr. Gilchrist's clients, and upon their death to "deal with the said residue" in the way pointed out by the will.

During his lifetime, the testator had written certain books and had obtained copyright; under agreements made by him with publishers, royalties are payable from time to time upon sales made. The executors have during the last fifteen years received these royalties and treated them as capital and paid the life-tenants the money arising from the investments made.

The life-tenants contend that these payments should be regarded as income.

I have come to the conclusion that neither contention is entitled to prevail, and that the case is one in which the amounts received must be apportioned between capital and income in accordance with the rule laid down in *In re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643.

In that case the estate had been given to trustees, with power to convert at such time as they saw fit, and pay income to a life-

tenant, and on the death of the life-tenant to divide; and it was held that, when the conversion did not take place within the year, in the exercise of the executors' discretion, the holding being in their opinion in the interest of the estate, when the holding came to be realised it should be apportioned between capital and income in the proportion that capital would bear to an assumed income at four per cent., with yearly rests, from the testator's death.

This rule is manifestly fair and has been acted upon in many analogous situations. In our own Courts the rule has been varied by substituting for four per cent. the legal rate of interest, five per cent.

Where the assets are in their nature unproductive, the interest has been directed to be computed from the end of the executor's year; but, when the assets are income-producing, the interest runs from the date of the death.

Here the testator had sold his property for a price payable *in futuro*, and as each sum came in it was partly capital and partly income. If the executors had been able to ascertain the amount to be paid, they, it is presumed, might have discounted it and then invested the sum received. This is precisely what is done by the rule in question. The true capital is the present value of the money received as of the date of death.

The question dealt with in the case of *Crawley v. Crawley* (1835), 7 Sim. 427, when read in the light of the discussion in *In re Whitehead*, [1894] 1 Ch. 678, and *In re Pope*, [1901] 1 Ch. 64, will be seen to be quite different from that here involved.

In re Hengler, [1893] 1 Ch. 586, *In re Godden*, [1893] 1 Ch. 292, *In re Morley*, [1895] 2 Ch. 738, *In re Cameron* (1901), 2 O.L.R. 756, will serve as examples of the various applications of this rule.

The Scotch case *Davidson's Trustees v. Ogilvie*, [1910] Sess. Cas. 294, relied upon by Mr. Gilchrist, arose out of the estate of the Revd. A. B. Davidson, and the result there arrived at was singular in the extreme. Dr. Davidson had, during his lifetime, sold some works on royalty agreements, and after his death his executors sold other works on similar agreements. The royalties payable under the latter were regarded as capital, the royalties under the former as income. The idea of apportionment was not

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suggested, and the case seems to me to have turned on Scotch law entirely and to be in conflict with the principles of the English cases.

A second question was raised as to the division of the proceeds of certain stocks held because not now marketable. When these are realised, the proceeds will be divided in the manner indicated.

Costs of all parties out of the estate.

Agnes S. Gilchrist and Josephine Thornton, the life-tenants, appealed from the judgment of MIDDLETON, J.

May 31. The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. Gilchrist, for the appellants, argued that the adjudication that the moneys in question should be apportioned between capital and income was wrong. The decision was based on *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643. These moneys should be declared to be income: *Davidson's Trustees v. Ogilvie*, [1910] Sess. Cas. 294; *Miller v. Miller* (1872), L.R. 13 Eq. 263; *Lawton v. Lawton* (1743), 3 Atk. 13; *In re Wilson*, [1907] 1 Ch. 394; *In re Sheldon* (1888), 39 Ch. D. 50; *In re Nicholson*, [1909] 2 Ch. 111; *Delage v. Nugget Polish Co. Limited* (1905), 92 L.T.R. 682; *Attorney-General of British Columbia v. Ostrum*, [1904] A.C. 144. There could be no doubt that the testatrix intended these small payments to be treated as income and to go to her sisters as such.

Hamilton Cassels, K.C., for the Toronto General Trusts Corporation, the trustees under the will of Jane Todd Kirkland, argued that the moneys were part of the corpus of the estate, and cited *Tickner v. Old* (1874), L.R. 18 Eq. 422.

F. M. Gray, for Knox College Ministers' Widows and Orphans' Fund.

E. C. Cattnach, for the Official Guardian.

July 12. MACLAREN, J.A.:—This is an appeal from the judgment of Middleton, J., rendered on the 5th May, 1916, upon an originating notice to construe the wills of the late Thomas Kirkland and of his wife, the question arising, as between the life-tenants and reversioners, whether certain sums received by her executors were income or corpus.

The husband died first and left a will giving his whole estate to his wife with a general power of appointment by deed, will or codicil.

Mr. Kirkland was the sole author of two school books and a joint author of two others. Separate agreements were made at different times with a firm of publishers to copyright these and to pay to the authors a certain royalty per volume; in three cases on the bringing out of each edition of each work, and in one case semi-annually on the sales actually made.

The dispute between the parties arises out of the proper construction of the following two clauses of Mrs. Kirkland's will:—

"2. I give devise and bequeath to my sisters Agnes Smith Gilchrist and Josephine Thornton for their own use absolutely in equal shares if they both survive me or all to the survivor of them if one of them should predecease me all the property real and personal of which I may die seized or possessed; but it is not my intention by this clause of my will to deal with or dispose of that portion of my husband's property (other than income) which has not been consumed by me during my lifetime even if it should at any time be adjudged by a Court of competent jurisdiction that the whole of my said husband's estate vested in me absolutely under my said husband's will."

Under the powers in her husband's will she appointed and declared by clause 3 that the property of her husband remaining at the time of her death should be transferred to the Toronto General Trusts Corporation in trust to pay certain specific legacies and "(k) To set apart and invest the residue of said estate and to pay the income and interest thereof to my sisters Agnes Smith Gilchrist and Josephine Thornton in equal shares during their natural life and upon the death of one of them then to pay the whole of said income and interest to the survivor of them during her natural life," and after her death to deal with the residue as directed.

The payments under these arrangements were treated by the trust company as capital, only the interest on them being paid to the sisters of the testatrix; who claimed that they were income, and, as such, properly payable to them under the will.

The judgment appealed from held that neither of these con-

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tentions was entitled to prevail; but that the moneys should be apportioned between capital and income; the amount which, reckoning from the date of the death of the testatrix, would, at five per cent., the legal rate of interest, compounded, have produced the respective amounts at the dates of their respective payments, to be reserved as capital, and the balance paid to the life-tenants as income.

With great respect, I am unable to concur in this judgment. It is based upon the decision in *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643, and certain cases in the English Courts and one in this Province which followed it, in which the rule above stated was applied, where certain assets could not be profitably converted or invested at the time directed, and the conversion and investment were deferred.

In my opinion, there is no analogy between these cases and the present. The royalties paid to Mr. Kirkland during his lifetime were clearly income. They were the proceeds of his labours and his earnings, and would be assessable as income. The annual income of an author includes all that he may receive during the year as the result of his literary efforts, whether from books or other literary productions during the year, or as the result of his labours in previous years. So also the moneys received by his widow after his death, from such sources, would be part of her annual income during the year in which she received them.

I am of opinion that the moneys in question properly fall within the terms of clause 2 of the will of Mrs. Kirkland above quoted, by which she gave the income from her husband's estate absolutely to her sisters, and which fully complies with the provisions of the latter part of sec. 30 of the Wills Act, R.S.O. 1914, ch. 120, which enacts that any bequest of personal estate "shall be construed to include any personal estate, or any personal estate to which such description will extend, which he (the testator) may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will."

But, even if clause 2 were not applicable, I consider that the moneys in question would then properly fall within the above clause 3 (k) of the will, as being part of the income of the residue of the estate, and as such would properly belong to the life-tenants.

To my mind it would seem extremely unlikely that the testatrix should ever think of these small semi-annual payments, which her husband and herself had been receiving as part of their income, being treated as capital, and only the interest upon them paid out to her sisters, and I think it should require extremely clear language to justify our putting such a forced construction upon the language of the will.

No case in point relating to such a disposition of property in a copyright, either in the English or American Courts or our own, was cited to us, not have I been able to find any. There is, however, a recent case in the Scottish Courts, *Davidson's Trustees v. Ogilvie*, [1910] Sess. Cas. 294, which is exactly in point. It was the unanimous judgment of a very strong Court. There the testator directed his trustees to hold the residue of his estate and to give to his niece the life-rent, use, and enjoyment thereof, and to pay to her the free annual income of the estate. The Lord Justice-Clerk said (p. 297): "I think the testator's intention is manifest. Of the books which he himself published he took the income for himself, and when he left the life-rent of his estate to anybody, I think he must be held to have intended that that from which he was deriving income should be a source of income to the life-renter, whoever he might be." Lord Ardwall said (p. 298): "With regard to the literary works published before the testator's death, he had been during his lifetime in receipt of the proceeds, as far as they consisted of royalties or profits, by way of income—income available for himself, to spend year by year as he pleased. . . . I cannot doubt that as a matter of intention we must hold that the free annual income of the estate means the free annual income as it existed at his death, of which these profits or royalties formed a part."

The case was thus decided upon a principle in which the Scottish law agrees not only with the law of England but with the civil law as well.

Lord Ardwall (p. 298) points out the strong analogy which exists between moneys received from copyright and those received from the working of a mine. The law of England on this point is the same as that of Scotland; the tenant for life, even if impeachable for waste, being entitled to the rents and profits of mines which have been opened: *Campbell v. Wardlaw* (1883), 8 App.

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Cas. 641, at p. 645; Bainbridge on Mines, 5th ed., p. 15. "Casual profits are income:" 4 Encyc. Laws of England, p. 9. Indeed, there is a much stronger reason for applying the principle to copy-right than to mines, as the duration of a copyright is fixed by statute, while the life-tenant of a mine might by excessive working exhaust it, and deprive the reversioner of any benefit or profit from it.

One of the most usual applications of the doctrine of the *Chesterfield Trusts* case is that of the municipal and other debentures which are payable by an equal annual or semi-annual payment covering both principal and interest, so that on the last equal payment the debenture is paid off. I am of opinion that the principle should be confined to such cases as those last referred to and those of deferred conversion or investment such as the *Chesterfield* case, and those in which it has so far been followed. I do not think it should be extended to a case like the present, which, in my opinion, differs so widely in its principle and its facts.

As to the second question, concerning the division of the proceeds of certain stocks not now marketable, I think the judgment appealed from is correct and should be affirmed, as it is precisely similar in its facts to the *Chesterfield* case.

As to the first question, regarding the proceeds from the copyrights, I think the appeal should be allowed, and the whole of these proceeds paid to the life-tenants. Costs out of the estate; those of the executor and Official Guardian as between solicitor and client.

MAGEE, J.A.:—I agree fully with the conclusions and reasons of my brother Maclaren.

The will of Thomas Kirkland gave all his estate, real and personal, to his executors and trustees in trust for the sole and separate use and support of his wife, Jane Todd Kirkland, during her life, and at her death in trust for whomsoever and for the uses and trusts that she might by deed or will or codicil appoint or declare, and, in default of appointment or in the event of her predeceasing him or in the event of a partial appointment only, then upon trust to deliver his household furniture and effects, including books, to his sisters-in-law, Agnes Smith Gilchrist and

Josephine Thornton, and as to the remaining estate upon certain trusts, the terms of which do not assist in the present questions.

The will is dated the 3rd June, 1896. He died on the 31st December, 1898.

In 1877 and 1878, he had entered into four agreements with a firm of publishers as to four works of which he was author, or joint author. In each of them he agreed that the firm should have the right of printing and publishing, reprinting and publishing and copyrighting, in Canada, the work specified, subject to the terms of the Canadian Copyright Act of 1875; and the firm agreed that they would register the work at Ottawa and comply with all the formalities necessary to secure the copyright of the book, and on the publication of each edition would furnish him with a certificate of the number of copies in such edition and pay him a certain royalty; and that, should the book be out of print for three months, or should they cease to carry out the provisions of the agreement, then their right of publishing should entirely cease and the author or authors might forthwith make any other arrangement he or they should see fit for the publication of the work in Canada. The royalty in the first agreement, as to one work, was a percentage on the retail price; that in the second and third, as to two other works, was so many cents on each copy printed. In the fourth agreement, as to the other work, the royalty was to be a percentage on the retail price, the amounts to be paid half-yearly on the 1st January and the 1st July each year, on the number of copies sold except on the first 1,000 copies. Apparently under the other three agreements the royalty would be payable on the publication of each edition.

The agreements were not sales of the copyrights for a sum certain, which the publishers must pay by fixed instalments, but were in effect "arrangements for publication," which the publishers were not bound to continue, and which, if they did not continue, the authors might make elsewhere. Also it is to be noted that the agreements were not in terms limited to the life of the copyright, though in practice they might be so.

It does not appear in what amounts or how frequently payments were made thereunder before his or his wife's death, but since her death they seem to have been made to her executors half-yearly and of small sums.

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She was at least entitled to the income of her husband's estate, and one can hardly doubt that both he and she considered the payments from the publishers to be income.

The reasons for the decision in Scotland in *Davidson's Trustees v. Ogilvie*, [1910] Sess. Cas. 294, would bear them out in so considering them, and those reasons commend themselves to me as interpreting the intention of the testatrix, and it is with her intention that we have to deal, as such intention is evidenced by the will, interpreted in the light of the nature of the estate.

Thus, when Mrs. Kirkland came to make her own will and to continue to her sisters the income of her husband's estate, one would naturally expect her to take the same view of the income and continue to them the enjoyment of that which she herself had a right to enjoy. That she did so is, I think, the effect of her will.

The second paragraph begins by giving, devising, and bequeathing to her two sisters, or the survivor of them, all the property, real and personal, of which she might die seized or possessed. Had it stopped there, the gift would, under sec. 29 of the Wills Act, R.S.O. 1897, ch. 128 (R.S.O. 1914, ch. 120, sec. 30), have operated as an exercise of the power of disposal which she had over her husband's estate, and would have included that estate—both corpus and income. She did not intend to include the corpus, and she adds the clause declaring “it is not my intention by this clause of my will to deal with or dispose of that portion of my husband's property (other than income) which has not been consumed by me during my lifetime.”

By excluding the income from the exception, she manifests her intention that the income shall be included in the gift, and shall go to her sisters thereunder, as it would if she made no exception.

It may be objected that the word “income” there means income up to her death, and that the testatrix was there drawing the line between what she would consider her husband's estate and what her own. But, in view of the fact that she does later on give the income to her sisters, the fair reading is, I think, “I mean the income to go to my sisters but not the corpus.”

It may also be said that this income given them means only the income which is thereafter given her sisters by the will, and so would not be carried to them by this second paragraph, but by

the third. This third paragraph declares that the property, real and personal, of her husband remaining at her death shall be transferred by the trustees under her husband's will to the Toronto General Trusts Corporation, to be held upon trust to deliver his household furniture and effects to the two sisters and to pay or set apart certain pecuniary legacies amounting to \$32,500 and to convey certain land to a nephew upon his attaining a certain age, and not to vest until then, and "to set apart and invest the residue of said estate and pay the income and interest thereof" to the two sisters and the survivor of them for life, and, upon the death of both the sisters, it directs payment of various legacies amounting to \$16,000, and the residue to two brothers or their issue as therein. Thus it was evidently not in the contemplation of the testatrix that in order to pay the \$32,500 of legacies it would be necessary to resort to the royalties, for she contemplated a surplus of more than \$16,000 after they were paid and outside of the land given her nephew. Hence we have a direction to set apart and invest the residue and pay the "income and interest" thereof to her sisters. This is in no sense inconsistent with the idea that the small income from royalties, which was practically incapable of realisation otherwise than by collection, should be set apart and should not be converted, but still treated as income, and that both the "interest" from investments and that "income" from royalties should go to her sisters for life.

Thus there is no inconsistency between the second and third paragraphs of the will as regards the royalties. The second paragraph gave all the income of the husband's estate, but the third paragraph reduced the estate from which that income was to be derived. Neither indicates that the income was to be other than that which the testatrix and her husband would consider, and properly consider, income.

The will of Mrs. Kirkland, being an exercise of a power, takes effect by virtue of the instrument creating the power. Had a bequest of income first to his wife and after her death to her sisters been contained in the husband's will direct, the reasoning of the *Ogilvie* case would apply to give these royalties to them. The asset remained the same as he had made it, unchanged in its nature and condition, though gradually being reduced; and

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I do not see anything to require a change in its destination, though that is declared by two instruments instead of one.

The question really before the Court is, whether these uncertain payments shall be considered income or principal, not how much of each shall be considered the one or the other. If the latter question were involved, the principle upon which the decision was made in *Beavan v. Beavan* (1869), 24 Ch. D. 649 (note), followed in *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643, would be applicable. But upon the true question, whether the royalties can be looked upon as other than income, the principle of the decisions as to mines seems to me the real one, and it was that principle which was followed in the *Ogilvie* case.

In truth, the application of the rule followed in the *Chesterfield Trusts* case only shews how little adapted it is to such a case as the present. Mr. Kirkland's estate included not only the royalties accruing up to his wife's death or during the lifetime of the two sisters or the survivor but the payments to be received thereafter so long as they should continue to be made. According to that rule, the present value of all these payments has to be ascertained as at the date of the death, and the person entitled to the income gets interest upon such present value as from the death. Hence not only the estate of the survivor of the two sisters but even the estate of the one first dying may continue long after both are dead to receive payments of income which the testatrix beyond doubt intended them to enjoy to the full during their lives, and neither they nor their executors can estimate, much less know, how much that income will be.

I agree that the appeal should be allowed as to the receipts under the agreements.

HODGINS, J.A.:—My reading of clause 2 in Mrs. Kirkland's will is that it deals with what she leaves as her own individual estate. She includes what had been derived from income from her husband's estate, which had been paid to her but had not been expended. This income was therefore money reduced into her possession, and it became in the hands of her executors part of the principal or corpus of her estate.

Clause 3 deals by way of appointment with the rest of her husband's estate which she had not consumed. If there were

accruing interest on mortgages or accruing dividends on stock, these would be included as part of the "residue of (her husband's) said estate," as to which she exercises her power of appointment.

In the same way, the moneys arising out of the agreements in question, even if similar payments had been treated as income during his life or her life, became after her death vested in the trust company, under her appointment, upon a trust to set apart and invest.

I cannot see that the *Davidson* case is helpful. If Mr. Kirkland had given his wife a life interest in what he described as "my income," his course of dealing with the royalty payments might properly lead to the conclusion that he intended them to go as income and had left them to his wife as such.

In three of the agreements there were lump sums to be paid at uncertain times, i.e., when an edition was published. They might not be made for years, because prior editions might last for a long period. When ultimately paid they would seem to me to partake more of the character of principal than income.

But, even if treated as income during his lifetime, they would pass, I think, to his wife as principal if found deposited in his bank or as choses in action coming in after his death. If in the wife's lifetime she had considered and dealt with them as income, yet they became part of the corpus of her estate on her decease.

The only remaining question is, whether, even if that would be so in ordinary cases of choses in action, these particular securities were similar in character to those dealt with in the *Chesterfield* case, or were, by reason of their peculiar nature, necessarily left outstanding, so that, if treated as set apart or retained, the sum they produced must be treated as one compounded both of principal and interest. They represented the value of literary works and their copyright. If they had been made payable in periodical and fixed instalments without interest, instead of sums made up of so much a volume in each edition when it came out or on each book sold, they might be treated as comparable to the securities of which the *Chesterfield* case affords an example. And, if so, I do not think the agreed mode of payment should cause any difference.

But a sale and conversion of these particular securities would

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have been practically impossible, and they necessarily had to wait realisation in ordinary course.

I think, therefore, that these deferred payments, whether treated as set apart or as assets whose realisation was postponed for the benefit of the estate, are within the rule stated by Street, J., in *In re Cameron*, 2 O.L.R. 756, followed in *Re Clarke* (1903), 6 O.L.R. 551, and that the judgment appealed from is right.

I would dismiss the appeal, allowing all parties costs out of the estate, those of the executors and trustees as between solicitor and client.

GARROW, J.A., agreed with HODGINS, J.A.

In the result, the Court being divided upon the main question, the judgment of MIDDLETON, J., stood affirmed upon all points.

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[IN CHAMBERS.]

July 21.

REX v. MERKER AND DANIELS.

Criminal Law—Keeping Disorderly House—Common Gaming-house—Police Magistrate's Conviction—Imprisonment—Appeal to Sessions—Order for Bail—Failure of Prisoners to Enter into Recognizances—Habeas Corpus—Right of Appeal—Motion to Quash Conviction—Evidence—Club-house Kept for Gain—"Keepers"—Persons Assisting in Care and Management—Criminal Code, secs. 226, 228, 749, 750, 797 (amended by 3 & 4 Geo. V. ch. 13, sec. 28).

The defendants were convicted by the Police Magistrate for a city, under sec. 773 (f) of the Criminal Code, for keeping a disorderly house, and were sentenced to 30 days' imprisonment. On their behalf an appeal was lodged to the Court of General Sessions, under sec. 749 of the Code; and an order was made by a Judge at Sessions that, upon the defendants entering into recognizances (of which he approved), they should be released from gaol. A Justice of the Peace went with the bondsmen to the gaol to have the recognizances properly entered into; but did not proceed, being informed by the gaoler that the defendants were not to be released:—

Held, that, although the bondsmen had signed the bail-bonds, and although the defendants were ready and willing to enter into the recognizances, they had not in fact done so—assuming that sec. 750 (c) of the Code was applicable; and were not entitled to be discharged upon *habeas corpus*.

Held, also, that an appeal from the conviction to the Sessions did not lie: the change in the Criminal Code, R.S.C. 1906, ch. 146, sec. 797, by 3 & 4 Geo. V. ch. 13, sec. 28, takes away the right of appeal which was given by sec. 797, and limits it to the special case of two Justices of the Peace.

Res v. Dubuc (1914), 22 Can. Crim. Cas. 426, approved.

Held, also, upon the evidence, that the place in respect of which the conviction was made—a club-house where "poker" was played for money—was a house kept by the club for gain (sec. 226 of the Code); it was, therefore,

a disorderly house (sec. 228), and the keeper was guilty of an indictable offence.

Although the defendants were not the real owners, and might not be the real keepers, they assisted in the care and management, and must be considered the real keepers (sec. 228 (2)).

Rex v. Jung Lee (1913), 22 Can. Crim. Cas. 63, and *Rex v. Hung Gee* (1913), 21 Can. Crim. Cas. 404, distinguished.

A motion to quash the conviction was refused.

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MOTION by the defendants, upon the return of a writ of *habeas corpus*, for their discharge from custody under a warrant of commitment issued pursuant to a conviction of the defendants by one of the Police Magistrates for the City of Toronto, under sec. 773 (f) of the Criminal Code, for keeping a disorderly house. The defendants were sentenced to 30 days' imprisonment.

The defendants also moved to quash the conviction.

July 20. The motion was heard by RIDDELL, J., in Chambers.

T. N. Phelan, for the defendants.

J. R. Cartwright, K.C., for the Crown.

July 21. RIDDELL, J.:—The defendants were convicted before the Police Magistrate for the City of Toronto, under sec. 773 (f) of the Code, for keeping a disorderly house—they were sentenced to 30 days' imprisonment. An appeal was lodged to the Court of General Sessions, under sec. 749, and His Honour Judge Morson ordered that, upon the defendants entering into recognizances (of which he approved) before a Justice of the Peace for the County of York, they should be released from the gaol. A Justice of the Peace went with the bondsmen to the gaol to have the recognizances properly entered into; but, being informed by the gaoler that the defendants were not to be released, the Justice of the Peace did not further proceed. Consequently, although the bondsmen had signed the bail-bonds, and although the defendants were ready and willing to enter into the recognizances, they did not in fact do so.

Assuming that sec. 750 (c) applies, the defendants have not entered into a recognizance. Accordingly the gaoler must obey the warrant under which he holds these defendants.

The application for discharge under the writ of *habeas corpus* must be dismissed and with costs.

Mr. Cartwright, representing the Crown, has generously

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agreed that I should now hear a motion to quash the conviction, on condition that no action should be brought by the defendants; and this has been agreed to.

In view of the fact that an appeal has been launched to the Sessions, I do not think I should dispose of the matter if an appeal lies, but I should leave it to be considered by the Sessions, where further evidence can be given, etc., etc.—and it has been agreed that if I should hold that such an appeal lies, I shall leave the matter for the Sessions, the defendants being in the meantime admitted to bail, but, if not, that I shall treat this as a motion to quash the conviction.

The conviction being under Part XVI. of the Code and not Part XV., it is sought to make the provisions as to appeal of Part XV. applicable by the “exception,” sec. 797. As amended by sec. 28 of 3 & 4 Geo. V. ch. 13, that provides that where a case of this kind is tried “before two Justices of the Peace sitting together an appeal shall lie . . . in the same manner as from summary convictions under Part XV.”

It will be seen, however, that this applies only to trials at which two Justices of the Peace sit together, not to the cases in which the Police Magistrate sits by himself.

We are not assisted by the definition of the word “magistrate” in sec. 771 (a) (vii.)—this has the effect of making every statutory provision in which the word “magistrate” occurs apply to trials, etc., before “any two Justices sitting together”—but it does not make the provisions of the statute in which the words “two Justices of the Peace sitting together” occur, apply to every description of magistrate, including a Police Magistrate. This is the fireside logic familiar to thousands who never heard of the “undistributed middle”—a mare is a horse, but it does not follow that a horse is a mare.

The change in the Act made in 1913, 3 & 4 Geo. V. ch. 13, sec. 28, takes away the right of appeal which was given by sec. 797 of the Criminal Code, R.S.C. 1906, ch. 146, and limits it to the special case of two Justices of the Peace.

Rex v. Dubuc (1914), 22 Can. Crim. Cas. 426, is rightly decided, in my view.

I think, therefore, that no appeal lies to the Sessions—and proceed to dispose of this as a motion to quash the conviction.

It cannot be denied—and it is not denied—that the place in question was a gaming-house, and the whole question is, was it “kept” by these defendants?

The evidence is not long: it establishes the following facts. An incorporated body, the City Social Club, came from Brantford to this city, and acquired premises in St. Patrick street. It has some 64 or 65 members who pay dues of 50 cents per month each. Merker is the secretary and caretaker, Daniels the treasurer. Whatever else the club may have, it has conveniences for playing poker, “stud” or ordinary. To “sit in the game” one must pay 50 cents and also pay \$5 for the common poker, \$10 for “stud” poker—he gets \$4.50 or \$9.00 in chips for these sums. From each “pot”—counsel said “jack-pot,” but I do not enter into technical detail—the sum of 10 cents is taken by the house. It does not seem that it is necessary to be a member of the club to be permitted to “sit in” the game: but I do not proceed upon that.

It is plain that this is a house kept by the club for gain, and therefore is covered by sec. 226 of the Code. It follows under sec. 228 that it is a disorderly house, and that the keeper is guilty of an indictable offence.

While the defendants are not the real owners and may not be the real keepers thereof, they assist in the care and management—and are consequently in law considered the real keepers: sec. 228 (2).

The cases cited by the defendants’ counsel are *nihil ad rem*.

In *Rex v. Jung Lee* (1913), 22 Can. Crim. Cas. 63, the Judge was considering what constituted a gaming-house, not who should be considered the keeper thereof—he had not sec. 228 (2) in view: and the same remark applies to the decision of Mr. Justice Beck in *Rex v. Hung Gee* (1913), 21 Can. Crim. Cas. 404.

The motion must be refused with costs as of a separate motion from the *habeas corpus*.

The attention of the Attorney-General will be called to the conduct of this club, that proper proceedings may be taken for the abatement of the nuisance.

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[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

August 1.

CITY OF TORONTO v. CONSUMERS GAS CO.

Municipal Corporations—Construction of Sewer in Highway—Necessary Lowering of Gas-pipes—Expense of—Liability for—Rights of Gas Company in Soil—11 Vict. ch. 14—Injurious Affection of Land—Right to Compensation—Municipal Act, 3 & 4 Geo. V. ch. 43 (R.S.O. 1914, ch. 192), sec. 325.

The judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, *City of Toronto v. Consumers Gas Co.* (1914), 32 O.L.R. 21, affirmed.

APPEAL by the Corporation of the City of Toronto, the plaintiffs, from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, 32 O.L.R. 21.

The appeal was heard by a Board composed of LORD BUCKMASTER, L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

Sir Robert Finlay, K.C., and G. R. Geary, K.C., for the appellants.

I. F. Hellmuth, K.C., and W. B. Milliken, for the defendants, respondents.

August 1. The judgment of the Board was delivered by LORD SHAW:—The action out of which this appeal arose was brought by the appellants, the Corporation of the City of Toronto, against the respondents, the Consumers Gas Company, to recover the cost of lowering a 20-inch gas-main belonging to the defendants on Eastern avenue, at or near the intersection of that avenue with Carlaw avenue, both avenues being public streets of Toronto. There is no question of the propriety of the construction by the city of the public sewer on Carlaw avenue, nor of the fact that such construction necessitated the lowering of the gas-main. These operations were not brought about in the interest or for the purposes of the gas company, but of the corporation, who, however, were acting undoubtedly in the public interest. Upon which—the city or the gas company—is the expense of the displacement and replacement of the gas-pipes to fall? This is the question in the case.

The trial Judge gave judgment in favour of the appellants. Upon an appeal by the respondents to the Supreme Court of Ontario, that Court allowed the appeal and dismissed the action. Although the amount involved is small, the question is of importance, and its settlement will regulate the general point of liability as between the city and the gas company for the cost of operations of a similar nature.

The Board entertains no doubt that the learned Judges of the Supreme Court have come to a correct conclusion. In the opinion of their Lordships, it is within the right of the city, in constructing a drain, to order the lowering of the gas-main, but it is the duty of the corporation to pay the cost of the operation.

The gas company was incorporated in the year 1848 by 11 Vict. ch. 14. Under sec. 1 of the statute, it was given power to purchase, take, and hold "lands, tenements, and other real property for the purposes of the said company."

By sec. 13 it was made lawful for the company, after two days' written notice to the city, "to break up, dig, and trench so much and so many of the streets . . . as may at any time be necessary for the laying down the mains and pipes to conduct the gas . . . or for taking up, renewing, altering, or repairing the same." Provision was made by the same section against unnecessary damage being done and uninterrupted passage being kept through the streets, the work having to be finished and the replacing of the streets accomplished without unnecessary delay.

By sec. 15 of the statute, the location of the gas-pipes was dealt with, and it was provided that they should be three feet from any other gas-pipes; and, with regard to their situation, if any differences arose on that point, these were to be settled by the surveyor.

Once the pipes were laid by statutory authority, then they, in fact, became *partes soli*. There seems little reason to doubt that in the year 1848, when the gas company thus laid down its pipes, the freehold of the ground was in the Crown. Whether this was so or not would not appear to make any difference as to the exact right acquired under the Act of 1848; but it is a circumstance worthy of note that the present demand by the corporation is a demand founded upon a right which vested in it or its predecessors

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subsequent to those rights which were created by statute in the gas company itself.

In *Metropolitan R.W. Co. v. Fowler*, [1893] A.C. 416, 425, Lord Watson dealt with the legal position in reference to a tunnel constructed by that railway company under part of the city of London, and observed: "The tunnel has become *pars soli* in the strictest sense of the words. If it had been constructed by one who was proprietor *à centro usque ad calum*, it would have passed, in the absence of exception, with his conveyance of the land. As matters stand, the owners of the soil, whoever these may be, are practically divested of interest in that part of it which has been converted into tunnel. They have no right to occupy or interfere with it in any way whatever; and their exclusion is not for a period limited, but for all time." And in another portion of his judgment (p. 427) he said: "I think the tunnel is as much 'land' as the highway itself, or any other part of the soil beneath." The same principle would appear to apply to the gas-main in the present case, laid down as it was by virtue of the authority of the Act of 1848.

It is now expedient to see what are the powers relied upon by the appellants as entitling them to charge upon the gas company the cost necessarily incurred by them of lowering the pipes of that company. One ground is thus stated by the learned trial Judge, whose opinion is, that the corporation "has the paramount duty of providing for the health of the citizens with reference to the construction of sewers on their streets, and that the defendants have only the right to use the streets for their own benefit, subject to that paramount authority." Certain decisions of Courts in the United States reports in support of this doctrine of paramountcy are quoted.

Their Lordships are of opinion that there is no such doctrine of paramountcy in the abstract, and that, unless legislative authority, affirming it to the effect of displacing the rights acquired under statute as above described by the respondents, appears from the language of the statute-book, such displacement or withdrawal of rights is not sanctioned by law. In this, as in similar cases, the rights of all parties stand to be measured by the Acts of Parliament dealing therewith; it is not permissible to have any preferential interpretation or adjustment of rights flowing

from statute; all parties are upon an equal footing in regard to such interpretation and adjustment; the question simply is—what do the Acts provide?

Before dealing with the statute specifically founded upon as justifying the position and claim of the city, namely, that of 1913, it may be convenient to state that in 1834, by 4 Wm. IV. ch. 23, the limits of the town of York were extended, and the town was erected into a city under the name of the City of Toronto. Under sec. 22 of that statute, it was given full power with regard to the surface of the streets and with regard to the repair, etc., thereof. There was in that statute no vesting with regard to the soil.

In the year 1849, by the Act 12 Vict. ch. 80, re-enacted by ch. 81, it was provided by sec. 31 that the Corporation had power to make by-laws for the erection, construction, or repair of such drains as the interest of the inhabitants required to be erected, etc., at the public expense. This Act was subsequent in date to the gas company's statute. It was repealed by 22 Vict. ch. 99, but under the latter statute power was given (sec. 290 (19)) to make regulations "for sewerage or drainage that may be deemed necessary for sanitary purposes." It was, however, not until that date, namely, 1858, that by that statute all roads, streets and highways were vested in the municipality.

This brief historical sketch has been ventured upon in order to make it clear that the position of the gas company cannot in any sense be looked upon as having been in the nature of encroachment upon existing rights, statutory or otherwise, of the City of Toronto.

The Act put forward, however, in support of the respondents' case is the existing Municipal Act of 1913, 3 & 4 Geo. V. ch. 43. By sec. 325 (1) of that Act it is provided: "Where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any

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advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected."

It is, however, extremely important to ascertain what the word "land" here mentioned embraces. Unless a careful attention be given to this point, the danger might be incurred of applying principles laid down in England, which extend and were meant to apply solely to land with the specific limitations of definition in the English Lands Clauses Act, to cases where these specific limitations are not found or where the definition is different.

Under the English Lands Clauses Act, sec. 3, the definition is: "The word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure." In the present case the definition of "land" is contained in sec. 321 (b). The whole of that section, dealing with not only land, but the terms "expropriation" and "owner," is important. The section reads in this way:—

"In this Part:

"(a) 'Expropriation' shall mean taking without the consent of the owner, and 'Expropriate' and 'Expropriating' shall have a corresponding meaning.

"(b) 'Land' shall include a right or interest in, and an easement over, land.

"(c) 'Owner' shall include mortgagee, lessee, tenant, occupant, and a person entitled to a limited estate or interest in land, a trustee in whom land is vested, a committee of the estate of a lunatic, an executor, an administrator, and a guardian."

The reasons have already been assigned for holding that the space occupied by the gas-mains and the gas-mains themselves of the appellants are of the nature of land in its ordinary sense. It must, however, be added, that in any view the definition of "land" in the Municipal Act unquestionably includes them. For it can hardly be denied that the words "a right or interest in, and an easement over, land," would embrace the right of the gas company to have their pipes remain, and to have the interest and use of them, and the space occupied by them undisturbed; nor can it be doubted that the company falls within the definition of owner as just cited. It thus appears plain that the taking,

without the consent of the owner, of this right or interest becomes subject to those provisions contained in sec. 325.

One of these provisions is that compensation is to be made where the land (thus including a right or interest in the land) is injuriously affected by the exercise of such powers. The corporation is accordingly liable in respect of such injurious affection. All that is asked in the present case is, that the displacement and replacement of the pipes shall be paid for. Without compensation, the city would not be empowered to make such displacement, and the measure of injurious affection, namely, the cost of the operation, would seem to be fully covered accordingly by the terms of the Act of Parliament.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed. The appellants will pay the costs.

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August 4.

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Banks and Banking—Securities Taken by Bank from Manufacturing Company—Bank Act, 3 & 4 Geo. V. ch. 99, sec. 88 (D.)—Insolvency of Company—Validity of Securities—Substitution or Consolidation—Goods Manufactured by Company—Goods Dealt in by Company, Manufactured by Others—Description of Goods—Sufficiency—Land Mortgages—Previous Agreement to Execute—Mortgages not Made until after Date Specified in Agreement—Intervening Insolvency.

The defendant bank advanced large sums of money to an incorporated company, its customer, to enable it to carry on its business of manufacturing and selling goods. The company also dealt as a buyer and jobber in a certain line of goods not manufactured by it. The company having become insolvent and being in liquidation under the Winding-up Act, the liquidator and a creditor of the company brought this action for a declaration that certain securities covering goods and mortgages of land, taken by the bank from the company, were invalid. The evidence shewed that the bank was from time to time making advances and taking securities under sec. 88 of the Bank Act, 3 & 4 Geo. V. ch. 9 (D.), on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in to replace it. A separate note and security were taken for each advance. A general security was also taken, referring to all outstanding notes, as to each of which a previous individual security had been taken:—

Held, that this was not a substitution but rather a consolidation, and the securities so taken were valid as against the plaintiffs.

Bank of Hamilton v. Halstead (1897), 28 S.C.R. 235, 241, distinguished.

But *held*, that to the extent that the securities previously taken, and held by the bank at the time the winding-up petition was filed, covered goods purchased by the company from other manufacturers, they were invalid, and

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such goods, and the proceeds of any since sold by the bank, belonged to the liquidator for the purposes of the liquidation.

Held, also, that the description of the goods in the security-documents, as being all the goods in certain warehouses described, was sufficient.

In May, 1912, a written agreement was made between the company and the bank, whereby the indebtedness of the company to the bank and the demand of the bank for additional security were recited, and whereby the company agreed that it would, on or before the 1st October, 1912, mortgage certain lands to the company as additional security for debts due and which might be contracted from time to time. The agreement purported to give a charge upon the company's land and plant until the mortgages should be executed. Pursuant to this agreement, two mortgages were made to the bank, but not until long after the 1st October, 1912, and at a time when, as the plaintiffs contended, the company was insolvent:—

Held, that there was nothing improper or illegal in the bank, at a subsequent date and pursuant to the previous arrangement, insisting upon and obtaining the mortgages, and they were valid securities in the hands of the bank as against the plaintiffs.

ACTION by the liquidator of Thomas Brothers Limited, an insolvent company (incorporated), in course of winding-up under the Dominion Winding-up Act, and by the National Match Company, suing on behalf of itself and all other creditors of the insolvent company, for a declaration that certain securities and mortgages taken by the defendants from the insolvent company were invalid; for an account of the assets, goods, wares, and merchandise of the insolvent company held by the defendants and of the proceeds of the sale of any part thereof sold; and for delivery of the securities to the plaintiff liquidator.

The action was tried by SUTHERLAND, J., without a jury, at St. Thomas.

Sir George C. Gibbons, K.C., and J. B. Davidson, for the plaintiffs.

D. L. McCarthy, K.C., and A. W. Langmuir, for the defendants.

August 4. SUTHERLAND, J.:—The Thomas Brothers Limited, an incorporated company, was engaged in business at the city of St. Thomas as a wholesale manufacturer of various kinds of woodenware. It was a customer of the Dominion Bank at its branch in that city and had a line of credit. The company having got into financial difficulties, a petition was, on the 28th March, 1914, filed by the defendant bank, and a winding-up order was made on the 1st May following. The plaintiff G. T. Clarkson was appointed liquidator, and the company is in course of liquidation.

The National Match Company is incorporated under the

laws of the State of Illinois, and is a creditor of the insolvent company to the extent of about \$14,000.

In the course of the dealings between the bank and its customer certain securities and mortgages were taken by the former from the latter. In this action the plaintiffs are the said liquidator and the National Match Company, which latter sues on behalf of itself and all other creditors of the insolvent company; and the plaintiffs' claim is, that the said securities and mortgages be set aside and declared void as against the plaintiffs and the other creditors of the insolvent company; for an account of the assets, goods, wares, and merchandise of the said insolvent company held by the bank and the proceeds of the sale of any part sold and received by it; and for an order for delivery and payment to the liquidator.

Thomas Brothers Limited manufactured certain lines such as woodenware, screen-doors, brushes, and the like, and dealt, as buyers and jobbers, in certain other lines such as baskets, matches, tooth-picks, coat-hangers, and the like. The line of credit in the year 1907 was \$150,000, which was increased in 1909 to \$175,000, and in 1910 to \$200,000. Securities were taken under secs. 74 and 75 of the Bank Act of 1890, 53 Vict. ch. 31, as amended in 1900, 63 & 64 Vict. ch. 26, secs. 17 and 18, and in 1913, 3 & 4 Geo. V. ch. 9, sec. 88, which is to be read as subject to sec. 90.*

Every year, apparently in January, a written request for a line

* Sections 88 and 90, so far as applicable, are as follows:—

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3. The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture.

4. If, with the consent of the bank, the . . . goods, wares and merchandise . . . upon the security of which money has been loaned under the authority of this section, are removed and other . . . goods, wares and merchandise . . . of substantially the same character are respectively substituted therefor, then to the extent of the value of the . . . goods, wares and merchandise . . . so removed, the . . . goods, wares and merchandise . . . so substituted shall be covered by such security as if originally covered thereby; but failure to obtain the consent of the bank to any such substitution shall not affect the validity of the security either as respects any . . . goods, wares and merchandise, . . . actually substituted as aforesaid or in any other particular.

5. Any such security, as mentioned in the foregoing provisions of this section, may be given by the owner of the said . . . goods, wares and merchandise.

6. The security may be taken in the form set forth in schedule C to this Act, or to the like effect.

7. The bank shall, by virtue of such security, acquire the same rights and powers in respect of the . . . goods, wares and merchandise . . .

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of credit during the current season was executed by Thomas Brothers Limited, in favour of the bank, in the following terms:

"We hereby request you to grant and continue during the current season a line of credit for our business of . . . dollars and to make us advances thereunder on the security of all goods, wares and merchandise, raw, manufactured and in process of manufacture (which are referred to below as goods), which we now have, and which we may from time to time during the use of such credit have in the buildings, yards, and the cellars thereof, known as Thomas Brothers Limited warehouse, 2580 St. Lawrence Boulevard, in the city of Montreal, Quebec, in the . . . and we agree to give from time to time to you security for said advances under section 88 of the Bank Act, covering all the said goods, or by warehouse receipts or bills of lading covering the same or part thereof. This agreement is to apply to all advances made to us under the said line of credit, the intention being that all said goods which we may from time to time have in said buildings or cellars shall be assigned from time to time to you as security for all advances."

From 1908 to 1913, the company executed and delivered to the bank securities under the said sections of the Bank Act, in the following form:—

"To the Dominion Bank: In consideration of an advance of . . . dollars made by the Dominion Bank to Thomas Brothers Limited, for which the said bank holds the following bills or notes (see other side) the goods, wares and merchandise mentioned

as if it had acquired the same by virtue of a warehouse receipt; provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale . . . manufacturer . . . in connection with any of the several wholesale businesses referred to . . . owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession or in any way disposes of the said security or of the . . . goods, wares and merchandise. . . .

90. The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt, or liability, unless such bill, note, debt or liability is negotiated or contracted,—

(a) at the time of the acquisition thereof by the bank; or,

(b) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank:

Provided that such bill, note, debt or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.

. . .

below are hereby assigned to the said bank as security for the payment of the said bills or notes, or renewals thereof or substitutions therefor, and interest thereon. This security is given under the provisions of section 88 of the Bank Act and is subject to the provisions of the said Act. The said goods, wares and merchandise are now owned by Thomas Brothers Limited and are now in the possession of Thomas Brothers Limited and are free from any mortgage, lien, or charge thereon, and are in the yards and buildings of Thomas Brothers Limited, factory property, St. Thomas, in their warehouse 2580 St. Lawrence Boulevard, Montreal, and in their warehouse 113 Queen St. W., Ottawa, and are the following: all goods, wares and merchandise, raw, manufactured or in the process of manufacture."

The amount mentioned therein was in each case the entire existing indebtedness, approximating \$200,000, inclusive of a small sum then being dealt with by way of advance or renewal, and for which a new note was being given. On the back of these contract forms was endorsed a list of all the outstanding notes, including that just referred to. A separate contract form of even date was also taken for the amount of the small sum then being dealt with. By way of illustration I may quote in part this separate form dealing with an alleged loan on the 20th September, 1913, which reads thus: "The Dominion Bank having this day loaned to us on demand note \$4,000, payable with interest at 6 per cent. per annum, and having at the time of making the said loan required collateral security therefor, we agree to give and have given as such collateral security the following property, namely, all goods, wares, etc." (following description in the general form already referred to). Similar forms were used until January, 1914.

On the 4th day of May, 1912, a written agreement was entered into between Thomas Brothers Limited and the bank, reciting that the customer was indebted to the bank in about \$200,000, contracted in the course of its business, that the bank had demanded additional security for such indebtedness in the form of a mortgage or mortgages upon the lands and plant of its customer, that the customer had passed all the resolutions and by-laws necessary to authorise the execution of the agreement and the mortgages contemplated thereby. The agreement then proceeds

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to say that, in consideration of the premises and terms and conditions set out in the agreement, the parties agree with one another as follows:—

“1. The customer will, on or before the 1st day of October next, grant and convey by way of mortgage to the bank the lands of the customer, being more particularly described” as set out in the agreement. “That the agreement and mortgage or mortgages shall be by way of additional security for debts now due to the bank, or which, by virtue of any changes in the customer’s account, may be contracted by it from time to time.”

The agreement also contains a covenant on the part of the customer that, during its currency and before the execution of the mortgage or mortgages, the customer would not sell, assign, transfer, charge, mortgage, or otherwise deal with any of its assets which then were or which should thereafter be in its possession or power, and which are covered by this agreement, otherwise than in the ordinary course of its business.

It also contains this covenant: “6. In so far as the customer can lawfully do so without impairing the validity of any existing agreement of contract between itself and the City of St. Thomas, this agreement shall, until the execution of a more formal mortgage or mortgages or other document, constitute a charge upon the lands and plant as hereinbefore defined or any such land and plant which may be subsequently acquired prior to the fulfilment of this agreement.”

Apparently there was some agreement between the company and the City of St. Thomas which would expire about the 1st September or the 1st October, 1912.

On the 27th November, 1913, Thomas Brothers Limited executed a mortgage in favour of the bank, reciting that the mortgagor is indebted to the bank for advances made and credits given by way of loans, payments, advances, discounts and otherwise in the usual course of the mortgagee’s banking business; that the bank has demanded security for the indebtedness, and the mortgagor consented to give the mortgage for that purpose; and, in consideration of the existing indebtedness and the sum of one dollar, the company mortgaged lot No. 20 in the city of St. Thomas, in the county of Elgin, according to registered plan No. 188.

On the 22nd January, 1914, what is called a deed of collateral security was executed by Thomas Brothers Limited in favour of the bank, reciting that the customer is indebted to the bank in \$200,000 for balance of loans and advances made in the ordinary course of business, with interest accrued; that the bank has demanded additional security for payment of the indebtedness and interest and renewals and substitutions, and that the customer is willing to give such additional security, by way of hypothec, on "that certain emplacement situated in the town of Outremont, fronting on Durocher street and composed of: 1st, subdivision lot number forty-eight (48) of subdivision lot number eight of official lot number thirty-two (32-8-48) on the official plan and book of reference of the parish of Montreal; 2nd, part of lot subdivision number forty-seven of subdivision lot number eight of the official lot number thirty-two (32-8-47) on the official plan and book of reference of the parish of Montreal."

It is contended by the defendants that the mortgage and deed of collateral security just referred to were given by the company to the bank in pursuance of the agreement of the 4th May, 1912, notwithstanding the statement therein that the company would give security by way of mortgage on or before the 1st October, 1912. It is also argued on behalf of the defendants, and appears to be the fact, that the deed of collateral security dated the 22nd January, 1914, had been discussed at or about the time of the mortgage of the 27th November, 1913, and that the making and execution thereof was delayed.

It is apparent that the bank was supplying the company with all the funds necessary to enable it to carry on its business. The funds necessary to purchase the supplies in the company's line of business as jobbers were also supplied by the advances of the bank.

It is apparent also, from the correspondence carried on between the head office of the bank and its local manager at St. Thomas, that the bank had been concerned about the condition of its customer's account in 1912 and 1913. The bank sent from the head office to St. Thomas in succession several employees—in December, 1913, a Mr. Macklin, later Mr. Niven, and early in February, 1914, a Mr. Joyce—to investigate, report, and oversee the business. In 1913, the bank had been insisting that its

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manager at St. Thomas should see that nothing was paid to outside creditors that could possibly be avoided.

On the 17th December, 1913, they wrote him: "The outstanding features in their statements are a net loss of \$13,478.58 with an increase in their liabilities of \$39,057, against an increase in quick assets of \$10,270, and it is evident from these figures that, unless they succeed in obtaining additional capital, the account will require most careful watching and firm handling on your part, if the bank's position is to be maintained. No more dividends must be paid without our consent, and you must see that no payments to trade creditors or expenditures on capital account are made which will decrease their quick assets to our disadvantage."

On the 9th January, 1914, they wrote him as follows: "I note that the wording in the letter of promise and lien forms you have taken and are taking from Thomas Brothers Limited is as follows: 'All goods, wares and merchandise, raw, manufactured or in process of manufacture.' I would like to have on record a more detailed statement of the goods covered by this description."

On the 17th January, 1914, they wrote: "Is it absolutely necessary to pay the National Match Company acceptance for \$1,461.05, maturing 23rd January? This business does not look attractive to us, and I think we should renew their paper where possible until we decide what course we are going to take in connection with this account. If this business is not profitable, what do you mean by saying that it helps their travellers and reduces their selling expenses by from 2 to 3 per cent. and in this way means a profit to them?"

On the 29th January they wrote: "I confirm my telephone message of to-day informing you that, in view of the statement of affairs submitted by the auditors, Messrs. Clarkson, Gordon, and Dilworth, we have decided not to pay any further amounts to outside creditors; and, as I then advised you, you had better ask Mr. Thomas to arrange for a meeting of their creditors as soon as possible at Mr. G. T. Clarkson's office in Toronto;" and again in the same letter: "In view of the present state of affairs, you should place our position fully before your solicitor to see if he has any recommendations to make. For one thing you might find out whether he thinks it would be advisable for us to place a man in charge of the stock and accounts receivable to emphasise

our ownership of these, and also to insure that all proceeds will be handed to us in liquidation of the company's indebtedness to us."

On the 30th January, 1914, they wrote their local manager informing him that they were sending an employee named T. W. Joyce to look after their interest in the making up and disposing of the stock on hand. In the letter they tell him to inform Mr. Thomas that this course must not be understood as any reflection on the company, but because the bank felt, under the circumstances, that it was absolutely essential that they should have their representative on the ground.

On the 29th January, 1914, a new form of application for loan for the current year was obtained by the bank from their customer. It commences as follows:—

"The undersigned is a wholesale manufacturer and purchaser of broom corn, brooms, handles, brushes, screen-doors and -windows, step-ladders, wash-boards, washing-machines, matches, baskets, etc., and is a wholesale manufacturer of the products of such goods. The Dominion Bank, herein called the 'bank,' is hereby requested by the undersigned to make advances to the undersigned (herein called the 'customer') from time to time, and in consideration thereof the customer doth hereby promise and agree as follows:—

"1. To give from time to time to the bank security for every such advance and interest by way of warehouse receipts, bills of lading, or securities under sections 86, 87, 88, and 90 of the Bank Act (or any sections of any Act or Acts which may be hereafter passed relating to the same subject-matter, whether by way of amendment, substitution, revision, or consolidation of the existing Bank Act or otherwise), covering all the products of agriculture, the forest, quarry and mine, and the sea, lakes and rivers, and all the live stock or dead stock and the products thereof, and all the goods, wares, and merchandise now or hereafter belonging to the customer, upon the security of which a bank may lawfully make advances, including all such products, stock, goods, wares, and merchandise (hereinafter called the 'goods') now or hereafter belonging to the customer, of the classes or description following, that is to say: (d) all raw material and goods manufactured or in process of manufacture, consisting

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principally of broom corn, brooms, handles, brushes, brush fibre, lumber, special dimension lumber, screen-doors and -windows, step-ladders, wash-boards, washing-machines, baskets, matches, and general stock in trade, etc.”

On the same day a document was signed by the customer, similar to that theretofore used, and stating that “the Dominion Bank having this day loaned to us on demand note six hundred dollars payable with interest at 6 per cent. per annum, and having at the time of making the said loan required collateral security therefor, we agree to give and have given as such collateral security the following property, namely, all raw material” etc. (repeating the same materials and goods as last quoted), “more fully described or referred to in a certain lien under section 88 of Bank Act,” etc.

On the same day, they also executed a new form of security under sec. 88 of the Bank Act, similar to that hereinbefore quoted, but covering materials and goods described as last mentioned, in place of as in the forms prior to the 29th January, 1914.

Thereafter these new forms were used between the bank and its customers. Throughout the whole period notes were given for the amount of the particular advances made at the time.

The new forms commencing with the 29th January, 1914, for the first time contained a clause to the following effect: “This security is given pursuant to the written promise or agreement of the undersigned, and especially of the agreement dated the 29th January, 1914.”

All subsequent forms contained a similar clause. All the notes outstanding were mentioned on the back of each of the general contract forms given under sec. 88, each of which had been issued under a previous promise, and a security had been taken under a previous promise for each of them.

In March, 1914, a representative of the bank, one Bergmann, went into possession for the bank at St. Thomas. At this time, and shortly before the petition for the winding-up of the company was filed, the indebtedness of the customer to the bank stood at about \$228,726. In the meantime the bank had realised from sales of goods about \$100,000; and, including interest to the time of the trial, the debt then stood at about \$135,000.

Two accounts were kept in the bank's books with the customer: one known as an advance account and the other as a sales account.

In the advance account were credited the notes and wages and all expenditures to people outside the bank, and in the sales account were credited the proceeds of all discounts and all deposits made. Customers' paper was discounted and cheques given on it to take up the demand notes on which the company had received advances from time to time. In the purchase account the proceeds of the demand notes were credited, and all cheques and drafts, notes and wages, were charged up—that is to say, notes and drafts to outsiders. The two accounts had to be looked to to ascertain the exact standing of the customer with the bank from time to time, and advances were made to the company in the advance account as they had credits in the other account. The two accounts had, of course, relation to each other, and seemed in reality to be treated as one account.

The contention of the plaintiffs is, that none of the securities referred to at the time of their acquisition by the bank were given in consideration of any actual present advance or the negotiation or contracting of any bill, note, debt or liability, at the time of such acquisition. They also contend that the said securities were invalid, inasmuch as there was no proper and definite description therein of the goods intended to be transferred, and that the goods in the factory at the time the defendant bank took possession were not the goods referred to in the securities, nor covered thereby. They also say that at the time of making the agreement of the 4th May, 1912, the mortgage of the 27th November, 1913, and the mortgage of the 22nd January, 1914, Thomas Brothers Limited were insolvent and unable to pay their debts in full, and that the said securities have the effect of preferring the defendant bank to the other creditors and of hindering and delaying them and the liquidator from realising their claims against the said corporation or a reasonable proportion thereof.

They also charge that the defendants have been in occupation and possession of the factory premises and goods, wares, and merchandise of the said corporation, have sold large quantities of goods manufactured and in process of manufacture and raw material therefrom, and have sold from the warehouses in Montreal and Ottawa large quantities of manufactured goods under title of the said securities and conveyances, and have excluded the plaintiff company and the liquidator therefrom, and

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that, as a result, the liquidator has been and the other creditors have been and still are prevented and hindered by the said securities and conveyances from liquidating and winding up the assets and affairs of the said corporation and realising at least a fair part of their said claims.

They also claim that in any event there was no authority under sec. 88 of the Bank Act for the bank taking security on any of the goods included in the jobbing portion of the business of the company.

It was held in *Bank of Hamilton v. Halstead* (1897), 28 S.C.R. 235 (*Halsted v. Bank of Hamilton* (1896-7), 27 O.R. 435, 24 A.R. 152), that an assignment made in the form "C" to the Bank Act as security for a bill or note given in renewal of a past due bill or note is not valid as a security under sec. 74 of the Bank Act. Girouard, J., at p. 241, says: "The bills or notes may be renewed, but not the security. The Act does not authorise the substitution of one assignment for another."

It is contended on the part of the plaintiffs that there was in reality the same course of dealing between the bank and its customer in this case as was held to be invalid in the *Halstead* case. It seems to me, however, from the evidence in this case, that the bank was from time to time making advances and taking a security under sec. 88 of the Bank Act on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in to replace it. A separate note and security were taken for each advance. A general security was also taken, referring to all outstanding notes, as to each of which a previous individual security had been taken.

This, as it seems to me, could not be called a substitution, but rather a consolidation. With some difficulty and doubt in the matter, I have come to the conclusion that, subject to the qualification about to be referred to, the securities taken by the bank under sec. 88 of the Act must be held to be valid as against the plaintiffs. In the case of a manufacturer, the bank had a right, on the strength of written requests, to advance on the goods, wares, and merchandise, raw, manufactured and in process of manufacture of its customer, and take security thereon in the form "C" provided in the Act. I see no authority, however, therein, for the bank taking the like security on goods purchased by

them from other manufacturers with which to carry on as a side line of their business a jobbing business. I am of opinion that to the extent that the securities previously taken, and held by the bank at the time that the winding-up petition was filed, covered goods so purchased they were invalid, and that the goods so held, or the proceeds of any since sold by the defendant bank, belong to the liquidator, to be utilised by him for the purpose of the liquidation of the company.

These securities were also attacked on the ground that the descriptions therein, at all events prior to the 29th January, 1914, were not definite or specific enough. It seems to me, however, where particular warehouses are mentioned in which the goods are said to be, and the description covers all the goods, that this is sufficient under the authorities.

As to the real estate securities, the position seems to be as follows. The bank had from time to time received statements from its customer in and prior to the year 1912, which seemed to shew that the business, though carried on with too little capital and expanding too rapidly, was successful. In that year, and under these circumstances, the bank was asking for collateral security on the real estate of the company, as it was permitted and authorised to do. The agreement, though dated in May, provided that the security was to be given on or before the 1st October next. There was an existing agreement with the Municipal Corporation of the City of St. Thomas which would expire, as already mentioned, about that time. The company also was hoping to obtain further capital, and feared that the placing of a mortgage upon its real estate might prejudice its efforts in this direction. The real estate securities were not given by the time mentioned in the agreement.

In 1913, a statement was prepared dealing with the company's business to the end of August, 1912, which seemed to shew a considerable profit. The bank and its local agent were watching the account carefully and anxiously during the year 1913, as the correspondence indicates and the evidence of the local manager shews.

In the fall of 1913 the bank procured an audit by Clarkson & Company, which seemed to shew that the previous statements made by the company to the bank as to profits were inaccurate.

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This naturally made the bank more anxious, and it then became insistent as to the real estate securities, and they were given as already indicated, under the pressure of the bank upon its customer. The bank manager testifies that at the time this security was given he still thought that the business would be successful. He attributed the difficulties of the company to the absence of one member of the firm from active oversight and the illness of another. While he apparently held too sanguine an opinion, at the time, of the prospects of the company, in view of the fact that the agreement to give security had been taken long before that, and on its face purported, in so far as it could without impairing the validity of the existing agreement between the company and the City of St. Thomas and until the execution of the formal mortgage or mortgages, to give a charge upon the lands and plant, I am of opinion that there was nothing improper or illegal in the bank, at a subsequent date and pursuant to such previous arrangement, insisting upon and obtaining the real estate securities referred to.

I am of opinion, therefore, that the attack upon these securities fails, and that they are valid securities in the hands of the bank as against the plaintiffs.

There was some slight evidence that certain goods of the company in Toronto had been sold by the defendants since the liquidation proceedings began. It was not made clear whether these were or were not covered or claimed to be covered under the bank's securities. I did not gather from counsel that any question as to these goods was specifically raised in this action.

A reference as to the jobbing goods may be a difficult and intricate one. It is possible that the plaintiffs and the bank may be able to agree upon a sum which the bank can pay to the liquidator to represent these goods. If this is not possible, there will be a reference to ascertain the value of the goods or the disposition made by the bank of such portion as has been sold by it.

In the circumstances, further directions and costs will be reserved.

Reference to Falconbridge on Banking, 2nd ed. (1913), pp. 251, 261; *Ontario Bank v. O'Reilly* (1906), 12 O.L.R. 420; *Toronto Cream and Butter Co. Limited v. Crown Bank* (1908), 16 O.L.R. 400; *Townsend v. Northern Crown Bank* (1912-13), 27 O.L.R. 479, 28 O.L.R. 521.

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Sept. 6.

HEROLD v. BUDDING.

Execution—Enforcement against Company-shares—Beneficial Ownership of Debtor—Company with Head Office out of Ontario—Receiver by Way of Equitable Execution—Interim Order—Motion to Continue—Notice to Debtor—Charging Order—Judicature Act, sec. 140 et seq.—“Company in Ontario”—Execution Act, sec. 12 et seq.—Powers of Receiver—Right to Sell—Application to Amend Receiving Order.

Equitable execution is not a means of reaching assets which in their nature are not exigible, but is a means of freeing exigible assets from impediments in the way of execution and reaching them when such impediments prevent them being taken in ordinary course; it cannot be made the means of reaching assets not in the Province.

Holmes v. Millage, [1893] 1 Q.B. 551, followed.

A receiver by way of equitable execution cannot sell; his function is to receive and hold; and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the property sought to be reached, unless the case can be brought within the provisions of sec. 140 *et seq.* of the Judicature Act, R.S.O. 1914, ch. 56 (dealing with charging orders).

Flegg v. Prentis, [1892] 2 Ch. 428, followed.

The plaintiff, having recovered in Ontario a judgment against the defendant for payment of a sum of money, obtained, *ex parte*, an order for a receiver, with a view to reaching shares in a company of which the defendant was said to be the beneficial owner. The company was a Dominion company, having a place of business in Ontario, but its head office was in Quebec:—*Held*, that the order should be regarded as an interim one, and a motion should be made (on notice to the defendant) to continue it.

Quære, whether the company was “a company in Ontario,” within sec. 140 of the Judicature Act.

Semble, if a charging order were made, the receivership would be ancillary to it.

Semble, also, that the plaintiff’s remedy was to make a seizure under the Execution Act, R.S.O. 1914, ch. 80, sec. 12 *et seq.*

A motion by the plaintiff to amend the order for a receiver, by adding a direction to sell, was refused.

MOTION by a judgment creditor, *ex parte*, for an order amending an order made by MIDDLETON, J., on the 26th June, 1916.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

J. M. Ferguson, for the applicant.

September 6. MIDDLETON, J.:—The plaintiff has a judgment against the defendant for the recovery of a sum of money. Learning that the defendant was the beneficial owner of certain stock in the Canadian Pacific Railway Company, a company which has its head office at Montreal, which was standing in the name of certain brokers who held the stock certificate, the plaintiff made

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a motion for an order for a receiver, and I appointed the sheriff receiver. My intention was that the order should be merely an interim order, to be followed by another final order, on notice to the debtor, but the order was issued as though final.

The present motion was made in vacation to my brother Britton, seeking to add to my order a direction to the receiver to sell. This my brother Britton has referred to me. The omission of any direction to sell was not, as is assumed, any clerical error or oversight.

Stock in a company was first rendered available to a judgment creditor of the stockholder in England, by the Imperial statute 1 & 2 Vict. ch. 110, sec. 14, afterwards enacted here. This Act is now found in sec. 140 *et seq.* of the Judicature Act, R.S.O. 1914, ch. 56.

This statute enables the stock to be charged with the payment of the judgment debt, and an order made thereunder "shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor;" but no proceedings are to be taken to have the benefit of the charge until after the expiration of six months from the date of the order (sec. 140).

The charging order is to be obtained after an order *nisi* has been served upon the debtor; this interim order precluding any transfer in the meantime to the prejudice of the judgment creditor (sec. 141 (1)).

The statutory provisions apply not only when the stock stands in the name of the debtor, but also when it stands "in the name of any person in trust for him" (sec. 140).

Assuming that this stock is that of "a public company in Ontario" so far as to fall under the statute (sec. 140), then the judgment creditor must follow the statutory provisions and obtain first the order *nisi* and finally the statutory charging order.

A receivership as ancillary to this is quite proper, but the order issued should be regarded as an interim order, and there should be a motion made, at the same time as the charging order is moved for, to continue the receivership till the charge is at an end. The receiver will be useful to obtain the income pending sale and also to obtain the documents of title to the shares.

When the charging order has been obtained, it cannot, under the terms of the statute, be enforced for six months, and then only in a new action: *Leggott v. Western* (1884), 12 Q.B.D. 287; *Kolchmann v. Meurice*, [1903] 1 K.B. 534.

[In England a mortgage or other charge may now be enforced upon an originating notice (Rule 768 (a)), but this Rule has not been adopted in Ontario.]

If this railway company is not "a company in Ontario" so as to come under this statute, the execution creditor may find himself without remedy, for reasons which I shall mention, unless the provisions of the Execution Act aid him.

By that statute, R.S.O. 1914, ch. 80, sec. 12, shares in an incorporated company "shall be deemed to be personal property found in the place when notice of the seizure thereof is served," and may be sold under execution in the same way as other personal property.

By sec. 13 (2), notice of seizure may be given when the company has in the bailiwick of the sheriff any place where service of process may be made.

By sec. 17, this procedure is made to apply to any equitable right in the shares seized.

The railway company has in this bailiwick a place where process can be served; and, in view of the very serious doubt as to this stock falling under the statute first mentioned, I think the execution creditor will be well advised if he makes a seizure in the mode provided by the statute.

Equitable execution, it is now well settled, is not a means of reaching assets which in their nature are not exigible, but is a means of freeing exigible assets from impediments in the way of execution and reaching them when such impediments prevent them being taken in ordinary course: *Holmes v. Millage*, [1893] 1 Q.B. 551; and clearly cannot be made the means of reaching assets not in the Province.

Moreover, a receiver by way of equitable execution cannot sell; his function is to receive and hold; and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the stock, unless the case can be brought within the statute first discussed: *Flegg v. Prentis*, [1892] 2 Ch. 428.

The equitable relief is merely a mode of clearing the way for the operation of the execution.

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If I am right in what I have suggested above, and this stock is, under our Execution Act, liable to seizure and sale, this execution creditor will find further difficulties to face, for the sale will have to be recorded in the railway company's books at Montreal. The receivership may well be used as a means of perfecting the purchaser's title; and an order authorising the receiver to do all things necessary to perfect the title in the purchaser ought to be made.

It is clear from this that the amendment now sought to my order ought not to be made; and the execution creditor must work out the situation for himself as best he can, after notice to the debtor.

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[APPELLATE DIVISION.]

Sept. 19.

ALTMAN v. MAJURY.

New Trial—Action against Police Constable—Forcible Entry and Arrest without Warrant—Defence—Justification—Reasonable Grounds for Belief that Offence Committed—Criminal Code, sec. 30—Leave to Amend—Discovery of Fresh Evidence.

In an action against a police constable for forcibly entering upon the plaintiff's premises without a warrant and arresting and assaulting her, the jury found that the defendant did as the plaintiff alleged, and that the plaintiff was not at the time keeping a common bawdy-house, and judgment for the plaintiff was pronounced by the trial Judge.

The defendant desired but was not permitted at the trial to set up that all he did was done in the belief, on reasonable and probable grounds, that the plaintiff had committed an offence against the Criminal Code for which she might be arrested by him without a warrant:—

Held, that, upon proof of this, the defendant might be considered justified in making the arrest, whether the offence had been committed or not (Criminal Code, sec. 30); and that there should be a new trial, with leave to both parties to amend the pleadings, in order that the real matters in question between the parties might be determined.

The defendant, in moving for a new trial, relied also on the discovery of fresh evidence; but that alone would not have warranted the granting of a new trial.

APPEAL by the defendant from the judgment of CLUTE, J., in an action tried before him with a jury at Toronto on the 27th and 28th April, 1916.

The plaintiff lived at No. 70 Beverley street, in the city of Toronto, and brought the action against the defendant, a police constable, to recover damages for forcible entry upon her premises

on the 23rd October, 1915, and arresting and assaulting her on that occasion.

The jury found, in answer to questions submitted to them, that the defendant did forcibly enter the plaintiff's premises and arrest her as alleged; that she was not keeping a common bawdy-house when the defendant entered her premises; and assessed the damages at \$1,500. On these answers, CLUTE, J., gave judgment for the plaintiff for \$1,500 with full costs.

The defendant appealed on several grounds, among others that the damages were excessive, and that new and material evidence had come into his possession since the trial.

September 19. The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

H. H. Dewart, K.C., for the appellant. It cannot be said that the arrest was malicious or without reasonable or probable cause. The trial Judge should have allowed the amendment asked for at the trial, and permitted the defendant to plead secs. 1143, 1144, and 1145 of the Criminal Code. Although the defence did not mention these sections, it referred to the Code itself. It may be that the pleading was hurriedly drawn. The defendant should be allowed to avail himself of the new evidence now in his possession.

E. G. Morris and *G. R. Roach*, for the plaintiff, respondent, contended that a new trial should not be granted on the ground of the new evidence that was said to be now available. The defendant could have asked for a postponement at the trial. The notice of appeal makes no reference to the amendment now asked for, and the defendant had ample opportunity at the trial of putting his case in proper shape. Section 30 of the Code is not applicable in this case.

Dewart was not called on to reply.

The judgment of the Court was delivered orally by MEREDITH, C.J.C.P.:—The trial of this case was not conducted in a manner which was quite satisfactory. It does not seem to me to have tended to a determination of the actual rights of the parties.

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The acts complained of by the plaintiff were the acts of the defendant, a police constable; and he desired to set up the defence that all he did was done in the belief, on reasonable and probable grounds, that the plaintiff had committed an offence against the Criminal Code for which she might be arrested by him without a warrant; and, if that were so, he may have been justified in making the arrest, whether the offence had been committed or not. But such a defence was not permitted to be relied on.

It may be that there was some misunderstanding on the part of all concerned in the trial; it may be that counsel for the defence did not state their point as clearly as it ought to have been stated; but that I cannot think a sufficient reason for depriving the defendant altogether of any defence he desired to make based upon the 30th section of the Criminal Code,* if any defence he really has under it.

That which ought to be done in all cases is to determine all the real matters in question between the parties, and that was not done in this case.

The defendant should have been allowed to rely upon the provisions of the Criminal Code, and, if necessary, leave to amend, so that he might, should have been given.

The application for a new trial is also based on the ground of the discovery of new evidence. If that were the only ground upon which it could be granted, I should not be in favour of granting it; yet it is a matter of some satisfaction that in this respect also the parties may have a fuller and better trial.

The judgment and verdict must be set aside so that there may be a new trial of the real, and the whole, matters in difference between the parties; and each party may now amend the pleadings so as to set up any substantial cause of action or defence that she and he may be advised to plead respectively.

All costs to be costs in the action.

*R.S.C. 1906, ch. 146, sec. 30: "Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not."

[MASTEN, J.]

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Oct. 2.

CRAWFORD V. BATHURST LAND AND DEVELOPMENT CO. LIMITED.

Company—Directors—Payment of Dividend Partly out of Capital—Ultra Vires—Ratification by Shareholders—Liability to Refund—Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 15—Status as Plaintiff of Shareholder who Received and Retained Dividend—Sec. 95 of Act—Counterclaim of Company—Commission Paid to Director—Sec. 92 of Act—Sums Paid to Promoters by Vendor-promoter before Incorporation of Company—Breach of Trust—Parties—By-laws and Resolutions of Directors—Confirmation by Shareholders—Ineffectiveness.

The defendant company was organised and incorporated under the Ontario Companies Act for the purpose of acquiring and reselling a tract of land which had been purchased from one W. by a syndicate, the members of which became the shareholders of the company. In an action by a shareholder of the company, on behalf of himself and all other shareholders except the individual defendants, against the company and six persons who were the directors of the company, to compel repayment to the company of sums alleged to have been improperly paid out of the company's assets, it was held:—

- (1) That a dividend paid to the shareholders was in part paid out of capital, and in so far as it was paid was *ultra vires* of the directors and incapable of ratification by the shareholders; and in an action properly constituted the directors might be ordered to repay the sum illegally paid out.

Seem, that other proceedings, either under sec. 15 of the Companies Act or by way of voluntary winding-up, might have been taken so as to reach the same result in a legitimate manner; but such proceedings had not been taken; and, even if taken, would not be a ratification of the distribution complained of in this action.

The plaintiff, however, having received and retained his share of the dividend, with knowledge that it involved an impairment of capital, was personally incompetent to maintain the action, and was in no stronger position because he represented himself as acting on behalf of himself and others.

Towers v. African Tug Co., [1904] 1 Ch. 558, followed.

Section 95 of the Act referred to.

The defendant company was entitled to judgment on its counterclaim against the plaintiff for the return of so much of the dividend paid to him as involved an impairment of capital.

- (2) That the payment by the directors of a commission to the defendant D. for his services in reselling the land, was, having regard to the facts of the case and to the provisions of sec. 92 of the Ontario Companies Act, invalid; and D. was ordered to repay the amount to the company. The directors who authorised the payment to D. were also made liable for it.

Bartlett v. Bartlett Mines Limited (1911), 24 O.L.R. 419, followed.

In re Ontario Express and Transportation Co. (1894), 25 O.R. 587, is to be considered overruled.

- (3) That sums paid to the defendants F. and D. for their services as promoters, by W., the vendor to the syndicate, also a promoter, out of the money which he received as the difference between the price at which he bought the land and that at which he sold to the syndicate, should be paid over by F. and D. to the company: F. and D., as promoters of the company and guardians of the interests of the syndicate subscribers, stood in a fiduciary relationship to those subscribers who afterwards became shareholders of the company; F. and D. committed a breach of trust in accepting these sums from W.; and the claim against F. and D. passed from the syndicate to the company.

Resolutions passed at a meeting of the shareholders of the company, six months after the impairment of the capital by payment of the dividend, and after this action had been begun, purporting to authorise and ratify

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the payments made to F. and D., were ineffective: there was no power in the shareholders or in the directors, in the circumstances, to make a gift or give a release to the two directors, and to do so was *ultra vires* of the company.

In re George Newman & Co., [1895] 1 Ch. 674, and *Re Publishers' Syndicate, Paton's Case* (1903), 5 O.L.R. 392, 406, followed.

The directors other than F. and D. were not liable upon this head: their action in attempting ineffectively to ratify the payments did not make them liable.

(4) It was objected that the plaintiff was incompetent to maintain this action—that it must be brought by the company itself—and it was said that the shareholders had declined to permit an action to be brought in the name of the company; but the rule applicable was declared to be that a single shareholder, either alone or on behalf of himself and others, may make the company a defendant and may sue in respect of an act beyond its powers, and which a majority of the shareholders are consequently unable to affirm.

ACTION by J. P. Crawford, suing on behalf of himself and all other shareholders of the defendant company, except the individual defendants, against the company, James S. Fullerton, John J. Doran, John A. Murray, C. J. Gibson, J. J. Bryan, and Matthew Ruckle, who were the directors of the company: first, for a judgment declaring that a sum of \$11,601.75, or two-thirds of it, being profits made by one Wallace in connection with the purchase and sale to a preliminary syndicate of a farm in the township of York, which syndicate transferred the farm to the defendant company, really belonged to the company, having been received by Wallace and the defendants Fullerton and Doran while they were promoters of and trustees for the defendant company or its shareholders, the members of the syndicate; secondly, for repayment to the company of a sum of \$8,122.22 paid to the defendant Doran as commission for his services as agent of the company in reselling the farm; and, thirdly, for a declaration that the individual defendants, as directors of the company, illegally declared and paid a dividend of 57 per cent., thereby impairing the capital of the company, and for repayment by those defendants of the sums so paid to the extent to which they were paid out of the capital of the company.

There was a counterclaim by the defendant company against the plaintiff for repayment of the dividend received by him.

December 20, 21, and 22, 1915, and January 13, 14, and 15, 1916. The action and counterclaim were tried by MASTEN, J., without a jury.

A. C. McMaster and J. H. Fraser, for the plaintiff.

N. W. Rowell, K.C., and H. J. Macdonald, for the defendant Fullerton.

H. H. Dewart, K.C., for the defendant Doran.

D. Urquhart, for the other defendants.

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October 2. MASTEN, J.:—The plaintiff is a barrister and solicitor formerly practising his profession at the city of Toronto, now an officer in His Majesty's forces; the defendant Fullerton is one of His Majesty's counsel learned in the law; and the plaintiff and the defendant Fullerton formerly carried on business as barristers and solicitors. The partnership was dissolved in or about the month of January, 1914.

The defendant company is a company incorporated under the Ontario Companies Act, R.S.O. 1914, ch. 178, by letters patent of incorporation dated the 17th March, 1913. The defendant Fullerton and his individual co-defendants, except C. J. Gibson, were elected directors of the company at its organisation meeting on the 7th April, 1913, and have since continued to act in that capacity. The defendant C. J. Gibson was appointed a director at a subsequent date, under circumstances which were discussed at the trial, but which, in the view I take, are unimportant. He was a *de facto* director, and acted as such.

The occurrences which give rise to the present action were the purchase, in the early part of 1913, of a certain farm property situate in the township of York, comprising about 156 acres of land; the formation of a preliminary syndicate and the acquisition by it of the said lands; the incorporation and organisation of the defendant company for the purpose of acquiring from the syndicate, holding, and reselling the above property; the subsequent resale of the farm and the course of action of the individual defendants in connection with these various transactions.

At the trial the plaintiff put forward three claims: first, for a judgment declaring that a sum of \$11,601.75, or in the alternative two-thirds of it, being profits made by one Wallace in connection with the purchase and sale of the lands to the preliminary syndicate, really belonged to the company, having been received by Wallace and the defendants Fullerton and Doran while they were promoters of and trustees for the defendant company or its

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shareholders, the members of the syndicate; secondly, that a sum of \$8,122.22 paid to the defendant Doran by way of commission for his services as agent of the company in reselling the land in question should be repaid to the company, because it was a secret commission, and because, Doran being a director, the preliminary by-law required in such a case by the Ontario Companies Act was not passed; thirdly, that the individual defendants, as directors of the company, illegally declared and paid out a dividend of 57 per cent., thereby impairing the capital of the company; and claiming that the individual defendants should be required to repay to the company the said sum to the extent to which it was paid out of the capital of the company.

Other claims set up in the statement of claim were not pressed at the trial, and I understand the plaintiff's claim, as now asserted, to be confined to these three claims now enumerated.

[The learned Judge then set out the history of the negotiations for purchase, and the payment by Wallace to Bicknell, the vendor, of \$2,500 as a deposit. He proceeded as follows:]

Under the agreement of purchase between Bicknell and Wallace, the purchase-price was \$725 per acre, and the terms of payment were as follows: \$2,500 as a deposit on the execution of the agreement; \$32,500 in cash on the 14th March, 1913; \$47,345 by the assumption of the existing first mortgage on the said property; and the balance to be secured by second mortgage.

On the 4th March, 1913, an agreement was entered into between Edwin Wallace as vendor and the defendant Fullerton as trustee and purchaser, whereby Wallace agreed to sell and Fullerton agreed to purchase the land in question at \$800 per acre. The terms of payment are set out as follows: \$2,500 as a deposit on the execution of the agreement (the receipt whereof was acknowledged); \$44,271.75 on the 14th March following; \$47,345 by the assumption of an existing first mortgage on the property; and the balance by assuming the second mortgage given by Wallace to Bicknell.

It is further provided in the agreement as follows: "It is understood and agreed by the parties hereto that the purchaser herein is a trustee for and on behalf of a certain syndicate formed to purchase the said property herein and sell the same for profit, and the vendor agrees to accept liability of the said syndicate and the

members thereof in lieu of any personal liability which might otherwise be incurred by the purchaser herein, and the vendor hereby agrees to release the purchaser from any personal liability in respect of this agreement or carry out the same."

The agreement was to extend to and to be binding upon the assigns of the parties.

A draft of this agreement, prepared in the office of Fullerton & Crawford, is produced as exhibit 43, but its contents call for special reference only in respect to a recital contained in it, which reads as follows: "And whereas the party of the first part (Wallace) is a nominal purchaser of the said land for a syndicate to be formed as hereinafter mentioned, in which said syndicate he is to have an interest." In revision this recital was excised. The evidence is conflicting as to the authorship of this draft; but, whether dictated by the plaintiff or by the defendant Fullerton, it shews a view which at that time was held by some one in the office of the solicitors for the purchaser. It does not prove the fact stated in the recital, but it affords some indirect indication of the situation as understood by solicitors acting on instructions presumably received from the purchasers, though on the other hand the excision of the recital in the subsequent drafts may indicate that it did not correspond with the fact.

On the same day (the 4th March) a syndicate agreement (exhibit 1) was drafted by the defendant Fullerton or was prepared in his office. This syndicate agreement is made between Edwin Wallace, of the first part, James S. Fullerton, as trustee, of the second part, and the subscribers whose names are signed to the agreement, of the third part. It witnesses that a syndicate is thereby formed for the purpose of acquiring the land in question, mentions the total capitalisation of the syndicate, refers to the agreement by which Fullerton became trustee, provides that the manager of the syndicate shall be the defendant Doran, and the treasurer shall be the defendant Fullerton, and the last clause is as follows: "It is intended to organise a joint-stock company, and in the company each subscriber hereto shall be entitled to shares in proportion to the number of shares held by him in the syndicate, and the trustee shall on request convey the said land to the company when so formed. The details of the formation of such company to be decided at any regular meeting of the shareholders."

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The agreement is signed by Wallace and Fullerton as vendor and trustee respectively, and by seventeen subscribers for shares in the syndicate, including the plaintiff, Wallace, Fullerton, and Doran. Subscriptions and payments pursuant to this agreement aggregated on the 14th March, 1913, \$57,700.

On the 5th March, the defendants Fullerton and Doran began actively canvassing subscriptions to the syndicate agreement.

[The learned Judge then referred to entries made and letters written by the defendant Fullerton, and proceeded:]

It is manifest on the evidence, and, indeed, is not contested, that from this date forward both the defendant Doran and the defendant Fullerton were actively engaged in the securing of subscribers to the syndicate. In this they were successful, and at the time when the first payment was due, namely, the 14th March, they had secured sufficient subscriptions and sufficient payments of money so that it was possible to carry out the transaction.

The organisation of this syndicate appeared to have been not only the contemplated, but also to have been the necessary, means of carrying through the transaction, because it is stated in the evidence, and but very faintly contested, that Edwin Wallace was not a man of such financial means as to have rendered it possible for him to carry out such a transaction as the one in question. He is described by the plaintiff as a client who did not pay, and appears from time to time to have borrowed small sums for his immediate personal necessities from his friend the defendant Fullerton. There is no suggestion that he did not repay these, nor any imputation on his honesty; but I am convinced, from the whole of the evidence given, that he was in fact not a man of such financial means or possessing such credit as to have been capable of carrying through any transaction such as is here under consideration.

On the 13th March, the firm of Bicknell, Bain, & Strathy, acting as solicitors for James Bicknell, the vendor, and Fullerton & Crawford, acting as solicitors for the purchasers, were contemplating the completion of the transaction on the next day, and in anticipation were preparing the requisite statements of adjustments and allowances on which to close the transaction. On the night of the 13th, Bicknell, Bain, & Strathy borrowed

from the plaintiff Crawford the agreement between Bicknell and Wallace, exhibit 3, and gave a receipt for the same. On the morning of the 14th this receipt was returned.

On the 14th March, the purchase of the lands in question from Bicknell was closed. Bicknell conveyed to Wallace, who expressly assumed the existing mortgage of \$47,345 and gave back a second mortgage containing his covenant to pay the balance as ascertained by the adjustments; and Wallace on the same day conveyed to Fullerton, pursuant to the agreements above mentioned. On this day, and in connection with the closing of the transaction as above outlined, the following instruments passed between the parties concerned:—

(1) Cheque for \$32,353.30 from Fullerton in trust to Edwin Wallace. This cheque is endorsed by Wallace to Bicknell, Bain, & Strathy, and forms the cash payment made on closing the purchase. It is exhibit 47.

(2) Cheque from Fullerton in trust to Edwin Wallace for \$11,601.75, being the difference between \$725 per acre, at which price Wallace bought, and \$800 per acre, at which he transferred to Fullerton in trust. This cheque was marked "good" at the Dominion Bank on the 14th, and stamped "paid" on the 17th. It appears to have been deposited in Wallace's account in the Bank of Ottawa on the 14th March. See exhibit 37.

(3) Cheque Edwin Wallace to Fullerton for \$3,867.25, being one-third of the amount of the cheque last mentioned. This cheque appears as exhibit 39, and the amount appears to have been deposited by Fullerton to the credit of his personal account in the Dominion Bank on the 15th March. See bank-book (exhibit 63.)

(4) Cheque of Edwin Wallace to the defendant Doran for \$3,867.25, exhibit 39. Cheque marked "good" by the Bank of Ottawa on the 14th March, deposited on the same date in the Bank of Montreal, and cashed on the 15th March. This cheque also is one-third of the amount received by Wallace from the syndicate as a profit on the lands sold.

(5) Cheque of "Fullerton in trust" to John J. Doran for \$2,500 (exhibit 47). From the evidence it appears that this cheque is a return to Doran of the deposit which had been paid to Bicknell when the agreement was delivered on or about the 4th March.

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From the recital of the facts as stated above it appears that Doran did not put up the whole of this \$2,500, and why the cheque was made to him does not very clearly appear upon the testimony. However, that was the way in which it was done, and forthwith out of this cheque of \$2,500 Doran pays to Wallace one-third, being \$833.33, and to M. S. Boehm & Company \$833.33. See exhibit 59.

On the 17th March following, the petition for the incorporation of the defendant company under the Ontario Companies Act was filed, and on the 22nd a charter issued.

The departmental file, including the petition for incorporation, was produced at the trial, and certified copies have now been put in. The charter recites the petition, and then proceeds to constitute the defendants Murray, Fullerton, Doran, and Gibson, along with the plaintiff, a corporation under the provisions of the Ontario Companies Act, and names the same five persons as provisional directors. There is nothing in the charter constituting the company a private company within the meaning of sec. 2 (c) of the Ontario Companies Act, R.S.O. 1914, ch. 178.

On the 7th April, a meeting of the members of the syndicate was held, at which meeting the plaintiff and all the individual defendants were present. At this meeting the substance of the action taken is recorded as follows:—

“Mr. Fullerton then reported that as treasurer of the syndicate he had received subscriptions amounting to the sum of \$57,700, and read a statement of the account of the syndicate.

“Mr. Fullerton then explained that the deal for the purchase of the property from Edwin Wallace to himself as trustee of the syndicate had been closed on the 14th March, 1913, and explained the whole transaction to the syndicate.

“Mr. Doran then addressed the meeting and stated that a plan of subdivision had been selected from a number of plans, and that the property was now being surveyed.

“Mr. Fullerton produced the letters patent of the Bathurst Land and Development Company Limited, and explained that these had been obtained by the provisional directors therein named for the purpose of the syndicate, and, on motion of Mr. Doran, seconded by Mr. Hohl, it was unanimously resolved that the syndicate should form itself into the said company, and that

the members of the syndicate should take stock in the said company in proportion to the amount of their shares in the syndicate."

On the same date the usual organisation meetings of the company were held, beginning with the meeting of the provisional directors, then a meeting of the shareholders of the company, at which meeting of the shareholders the defendants Murray, Fullerton, Doran, Bryan, and Ruckle were appointed permanent directors of the company. In the record of this meeting the following minute appears: "A report was read by the secretary, shewing the number of shares subscribed and underwritten, the names of the subscribers and underwriters, the amount paid thereon, the amount of preliminary expenses, and a financial statement of the affairs of the company."

Neither the minute-book nor any other record of the company submitted in evidence shews this report or the financial statement said to be embodied in it, and it is very doubtful whether any such report was submitted to the meeting. If required to find on that point, I would find that no financial statement was presented to the meeting so as to be apprehended by those present or even brought to their notice.

[The learned Judge then set out the proceedings at a meeting of the permanent board of directors held on the same day, and continued:]

Nothing appears in the minute-book or in any other record of the company produced in evidence shewing any account approved or directed to be paid, or any statement of preliminary expenses.

At an adjourned meeting of shareholders, held immediately after the meeting of permanent directors, the various by-laws and acts of the permanent directors were confirmed.

While somewhat informal, I am of opinion that the result of the action taken was to transfer to the company all the property, real and personal, of the syndicate, including any claim which the syndicate might have against Fullerton and Doran in respect of the sums received by them from Wallace.

On the organisation of the company, Doran was elected a director, and was appointed on the 7th April, 1913, vice-president and general manager, which position he continuously retained until the time of the trial. The lands in question having been acquired by the company on the 7th April, 1913, the next object

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was to resell them at a profit; and various real estate agents had been employed by the company from time to time, and efforts made to effect such sale, but nothing had resulted. Early in the year 1914, the condition of the real estate market began to occasion concern to the directors. I find nowhere, either in the minute-book of the company or elsewhere, any record of an authorisation to Doran to act on behalf of the company in procuring a sale of the lands; but, no doubt, in pursuance of his duties as general manager, it was his duty to accomplish that which was the chief purpose of the company. There is no by-law of the company specifically prescribing the duties of the general manager, though by-law number 14 indicates in a general way his powers and duties of general oversight of the affairs of the company.

The first and only reference anywhere in the minutes of the company to this payment is to be found on the 29th May, 1914, of a meeting described as a "meeting of the Bathurst Land Development Company Limited;" and I take it, from the character of the business transacted, that it was a meeting of directors, and not a meeting of shareholders. Those present at this meeting were the president (J. A. Murray) and Messrs. Bryan, Gibson, Doran, and Fullerton.

In the minutes of this meeting the following item occurs: "The following statement of liabilities were put in by the secretary-treasurer, . . . commission Doran \$8,121.22."

No motion with reference to this statement was brought before the meeting, and no resolution was passed. From the cash-book it appears that this sum was paid to Doran on the 29th May; and the cheque in payment appears in the cheque-book as number 27, "commission re sale B. L. & D. Co." It is signed by the Bathurst Land and Development Company Limited, by J. A. Murray, president, and James S. Fullerton, secretary-treasurer.

From the evidence given at the trial it appears that Doran did act as the agent of the company in procuring the sale of these lands to Robins Limited. He claims that he was instructed to this effect on the 27th March, 1914; but upon a perusal of the minutes of the board meeting held on that day, there does not appear to be any record of an authorisation to him to act in that capacity. According to his own testimony, Doran understood

from the beginning that he was to have the opportunity of acting as agent for the company in selling the property; though there is nowhere any record of such an arrangement. The payment of commission to him was not submitted to or approved by the shareholders until November, 1914.

In the month of April, 1914, an option on the lands in question was given by the defendant company to Robins Limited. This option is put in as exhibit number 8, and it provides for a cash payment in all, if the option is accepted, of \$50,000. It also provides for the assumption by the purchaser of the two other mortgages then outstanding on the property, and the giving back by Robins Limited, or its nominee, to the vendor, the defendant company, of a third mortgage for the balance of the purchase-price; this mortgage amounting, when the adjustments were made, to \$50,851.13.

The option was accepted by Robins Limited, and a cash payment of \$45,000 made on the 28th May, 1914. Previous to that a cash payment at the time of the taking of the option had been made of \$5,000, but this had been exhausted in the payment of interest on the outstanding mortgages.

On the 29th May, 1914, the day after the receipt from Robins Limited of this large sum, a meeting of directors of the company was held; and the following note appears in the minutes:—

“The amount at present in the bank is \$45,014.48. The disbursements as above are \$8,829.22; which will enable us to pay a dividend of 57 per cent. and leave a balance in the bank of \$161.76 to the credit of the company.”

It was “moved by Mr. Fullerton, seconded by Mr. Gibson, that a dividend of 57 per cent. be declared and be paid to the shareholders forthwith. Carried.”

On the same day, cheques were issued to each of the shareholders, including the plaintiff, for a dividend of 57 per cent. The cheque to the plaintiff is marked as exhibit 27, and is signed by the Bathurst Land and Development Company, per J. A. Murray, president, and James S. Fullerton, secretary-treasurer. It is marked “57 per cent. dividend B. L. & D. Co.” All the other payments appear to be made in exactly the same way.

At the time when this dividend was declared, it appeared that, after providing for all the debts and liabilities of the company,

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there remained a net profit on the sale of the lands in question of \$25,003.72. This was on the basis that the third mortgage for \$50,851.13 was good. Having regard to the fact that the purchaser who was giving this mortgage had actually paid in cash, as a first payment on the purchase, \$50,000, it seemed reasonable to suppose that this mortgage was good; and I think the directors were justified in acting on that belief, and that to the extent of the profit then shewn, namely, \$25,003.72, the declaration of a dividend by them was justifiable. But as a matter of fact they did distribute, in pursuance of the resolution above quoted, \$36,024; and to the extent to which the sum so distributed exceeded the net profits it was a payment out of capital, reducing the capital stock of the company, and was unauthorised and unwarranted.

On the 18th September, 1914, a meeting of the shareholders of the defendant company was held, and this minute is entered: "After discussion in which the financial affairs of the company were generally considered from the date of its incorporation, it was moved by J. P. Crawford, seconded by T. A. Eaton, that J. P. Crawford be authorised to take such proceedings in the name and on behalf of the company as may be deemed advisable to recover from Edwin Wallace, Esq., J. J. Doran, Esq., and James S. Fullerton, K.C., the sum of \$11,601.75, or any part thereof alleged to have been paid to them as promoters' secret profit. The motion was defeated upon the following vote." The votes recorded in favour of the motion consisted of the vote of the plaintiff, J. P. Crawford, twenty-five shares, and of T. A. Eaton, twenty-five shares: total, fifty shares. Opposed to the motion, three hundred and forty-two shares, of which seventy were voted by Mr. Fullerton and fifty by Mr. Doran. The motion was therefore lost. Even assuming that Fullerton and Doran had refrained from voting, there would have been two hundred and twenty-two shares against fifty, negating the motion.

On the 4th November, 1914, at a meeting of the directors, which appears to have been regularly held, a by-law was passed reciting that a sale of the lands of the company had been effected through J. J. Doran, a director of the company, who had acted as vice-president and general manager without salary; reciting a payment to him of \$8,121.22, being 5 per cent. of the sale-price,

and declaring that he is entitled to the sum in question as commission, and thereupon the by-law ratifies, approves, and confirms the payment theretofore made to him. At the same meeting, by-law number 8 was proposed and carried. It recites that the company was incorporated and organised for the purpose of acquiring and disposing of the property known as Bathurst Centre; that the property has now been disposed of; that the company has ceased to carry on business except for the purpose of winding up its affairs; and the by-law then proceeds to enact: (1) that the assets of the company as the same are realised be distributed among the shareholders of the company *pro rata* according to their respective paid-up subscriptions, at such times and in such amounts as the directors may deem advisable; (2) that the payment of a dividend of 57 per cent. upon the paid-up capital stock of the company heretofore made be and the same is hereby approved, confirmed, and ratified as part of the said distribution; (3) that the directors be and they are hereby authorised and instructed to make application to the Lieutenant-Governor in Council for the confirmation of this by-law. "Passed by the directors of the company the 4th day of November, 1914, and confirmed by the shareholders of the company the 4th day of November, 1914."

On the same day, the 4th November, 1914, a meeting of shareholders was held, as appears by the minute-book, exhibit 5, at p. 99. The shares were nearly all represented either by the shareholders in person or by proxy; and the plaintiff and Mr. T. A. Eaton were present. A motion was made by Mr. Crawford and seconded by Mr. Eaton that the meeting adjourn for two weeks or until such time as the trial of the action pending (this action) be disposed of. The motion was defeated; all the shares represented, except those held by Mr. Crawford, Mr. Eaton, and Mr. Noonan, voting against the resolution.

By-law number 4, above referred to, and just passed at the directors' meeting, relative to the payment of commission to Doran, was approved and confirmed, no votes being recorded against it.

At the same meeting it was moved by Mr. Lawson, seconded by Mr. Ruckle, that "the by-law passed by the directors pursuant to section 15 of the Ontario Companies Act for distribution of

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the assets of the company among the shareholders be and the same is hereby confirmed, and that the distribution of the assets of the company already made by the directors be and the same is hereby approved and confirmed. Carried." No votes were recorded against the resolution; Mr. Eaton not voting, and Mr. Crawford having withdrawn.

At the same meeting of shareholders a further resolution was passed, as follows: "It was moved by Mr. Lawson, seconded by Mr. Ruckle, that, the payment of \$3,867.25 which was made by Edwin Wallace to J. J. Doran, and the like payment to J. S. Fullerton out of the profit made by the said Wallace on the sale to this company of Bathurst Centre having been explained to the satisfaction of this meeting, it is hereby resolved *and enacted as a by-law of the company*, that the company renounces all claim against the said Doran and Fullerton in respect of the moneys so paid to them, and that the retention by the said Doran and Fullerton be and the same is hereby approved and confirmed, and that the whole transaction as between Wallace, Doran, Fullerton, and the company, be and the same is hereby confirmed, approved, and ratified."

The above statement affords some consecutive account of the chief occurrences giving rise to this action; but, in addition, it is desirable to state my findings on certain issues of fact which were debated at the trial:—

I find that the evidence adduced fails to establish that the defendants Fullerton and Doran or either of them were co-owners with Wallace or co-partners with him, or that they were legally entitled in any other way to a share with Wallace in the lands in question or in the option held by him prior to the 14th March, 1914, and they were not vendors to the syndicate.

I find that the firm of Fullerton & Crawford acted from the beginning and throughout as solicitors for Wallace, for the syndicate, and for the defendant company; that both Fullerton and Crawford and a law-student named Lawson carried on this solicitor's work up to the 14th March, and that the plaintiff Crawford was actively concerned in it. I find that the papers relating to the transaction were kept in the office of Fullerton & Crawford and were open and accessible to the members of that firm generally; that the agreement of sale from Bicknell to Wallace was among

these papers relating to the matter, and was lent by the plaintiff to the vendor's solicitors on the night of the 13th March. Fullerton, Lawson, and the plaintiff were individually subscribers to the syndicate, the latter to the amount of \$5,000.

I find that these facts, coupled with the positive statements of the defendants' witnesses, outweigh the statement of the plaintiff that he was unaware of the price per acre at which the lands had been bought by Wallace from Bicknell, and the price at which they had been sold, and the consequent resulting profit on such sale; and I find that the plaintiff knew that a profit was being made by Wallace, and raised no question regarding it until after the dissolution of partnership in 1914. In making that finding I do not desire to suggest that the plaintiff is now intending to swear falsely, but I believe that his memory respecting the matter, which was manifestly not sharp and definite regarding many of the details, has played him false in this regard.

With respect to the members of the syndicate other than Crawford, I do not find it to be established that they were as a body or generally aware of the price at which the lands had been purchased. Fullerton and Doran, and possibly one or two others who were in the inner circle, may have known; but, if it were necessary to make a finding upon that point, I should find that the syndicate did not know the price at which the property was bought by Wallace, and that no statement was made to them at the syndicate meeting in April, 1913, giving them any information on that point. In this connection I am particularly impressed by the terms of the letter of the 11th September, 1914, written by Fullerton to Matthew Ruckle, in which Fullerton says: "Wallace came in to me as any other client would, told me he had an option on this property at \$800, that he was going to try to raise a syndicate, and asked me to act as trustee, to which I consented."

The conclusion is that there was no general disclosure by Wallace, Fullerton, or Doran to the syndicate of the price at which the lands were acquired from Bicknell.

With respect to the fact that Wallace divided the \$11,601.75 of profits received by him into three equal portions, and handed over one-third thereof to each of the defendants Fullerton and Doran on the 14th March, I find that there was at the time no

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disclosure of any sort, and that neither the plaintiff nor any of the subscribers to the syndicate were aware of that circumstance. Nor was disclosure of that fact made to the shareholders of the company until the meetings which were held in the latter part of 1914.

Considering the sequence of events as shewn by the foregoing statement of facts; considering that, if not contemporaneous, Wallace's agreement to sell to Fullerton as trustee followed immediately on the securing of the Bicknell agreement; considering Wallace's financial position; considering the sources from which were derived the deposit of \$2,500 paid to Bicknell, including as it did \$833.33 from Doran; considering that in both the Bicknell and Fullerton agreements the deposit is the same amount, namely, \$2,500, and that its receipt by Wallace is acknowledged; considering the provision in the Bicknell agreement that \$2,500 should be paid as a deposit on the execution of the agreement; considering that all the balance of cash paid to Bicknell, aggregating \$34,000, was derived from the members of the syndicate—I find that, when the agreement for the lands in question was taken in the name of Wallace, it was so taken with the purpose and intention of immediately forming a syndicate and turning the lands over to it, and that Wallace could not, without the assistance of the syndicate or other aid, have carried through the proposed undertaking.

But I find that Wallace did not take the lands, or the option to buy the same, impressed with any trust. He might, if financially able, himself have held the lands, or he could legally have sold them to any one whomsoever.

I find that Fullerton and Doran were each promoters of the syndicate and of the defendant company which grew out of it.

The first active step towards the formation of the syndicate appears to have been taken on the 4th March, when the syndicate agreement and the agreement between Wallace and Fullerton were signed.

I find that Doran became interested in these affairs not later than the 1st March, 1913, when he put up one-third of the initial deposit, expecting to receive some part of the profits, and that Fullerton became interested as a promoter in the venture not later than the 4th March, 1913, when he became trustee for the

proposed syndicate. He had previously been acting as solicitor. As Fullerton is a brother-in-law of Doran and introduced him to the venture, I suspect that he became interested at the same time as Doran, but I do not find this established by the evidence.

Doran acknowledges that he expected a share of the profits made by Wallace on turning over the property to the syndicate.

Fullerton's statement is as follows. Referring to the occurrences on the 14th March, he is asked:—

“Q. Then did you have an interview with Mr. Wallace on the 4th of March? A. Yes.

“Q. After the deal had been closed? A. In my examination I fixed that interview on the 15th, speaking from the date a certain cheque appears in my bank-book, but subsequent consideration makes me quite certain that was on the 14th. When I came back to my office, and I think it was immediately after dinner, I found Mr. Wallace sitting in my chair in my office with his crutches leaning up against the table. I do not remember what greeting I gave him. He was rather a jovial character, and I probably said something in chaff to him, and waited, and he said: ‘Fullerton, I have come in to see what you thought you ought to get out of this.’

“Q. Yes? A. And the statement rather startled me, and I said, ‘Mr. Wallace, before we consider that, there is something I want to say to you.’ I said: ‘I want you to understand that I am not entitled to one dollar of this. There is no agreement or understanding between you and I that I am to be paid, and I want you to understand that.’ And I stopped, and he looked up and said, ‘Well, come into Mr. Doran’s room, I would like to discuss that further.’ He walked in—Mr. Doran’s room was across, next to my office—and he walked in there, and I followed him, and I there stated in the presence of himself and Mr. Doran that he had asked me what I expected to get out of it, and that I had told him that I was not legally entitled to one dollar, that that was his money, but he knew what I had done in connection with the matter, and it was for him to consider if he felt like giving me anything. He asked me how would \$300 strike me—I notice he says \$305 in his affidavit—my recollection is \$300. I said to him: ‘The amount is entirely for you, but I have got in at least half of the subscriptions, and it is owing to my efforts this matter

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has gone through for you as well as it has; if, under these circumstances, you feel disposed to give me a bonus or gratuity, I will accept it, but the amount of that or whether you give it or not is entirely for you to say.' I turned and walked out.

"Q. Then when did you next see him after that? A. My impression is it was the next morning, it was either that afternoon or the next morning, and my impression is it would be the next morning, because I banked a cheque the next day. He came in and handed me a cheque for one-third of the amount that had been paid to him.

"Q. Yes? A. And left it with me."

I am, however, of opinion that Fullerton would have been surprised and disappointed if a fair proportion of Wallace's profits had not reached him. I think there was no definite arrangement or agreement between Fullerton and Wallace, but I think there was a general expectation on the part of both Fullerton and Doran that in some proportion they would share in Wallace's profits, and that this was the position in which Wallace, Fullerton, and Doran stood on and from the 4th March, when the trust agreement with Fullerton and the syndicate agreement were drawn up, and that Fullerton and Doran entered upon the promotion of the syndicate with this in their minds.

I repeat that I do not think it established that they had any legal claim or thought they had any legal claim against Wallace to an interest in the lands in question, nor a legally enforceable claim to a share in his profits; but the facts above stated, coupled with the happenings on the 14th March, convince me that from the first there was what in real estate parlance might be termed "a gentlemen's understanding" between the three, which was carried out by Wallace on the 14th March when he gave to each of them the sum of \$3,867.26.

I find that on the 14th March, 1913, though Wallace as vendor had conveyed the lands to Fullerton as trustee for the syndicate and had received the purchase-price agreed to be paid to him, yet he still remained vitally interested in the enterprise and in the success of the undertaking. I note in particular the following points:—

(1) He was individually a member of the syndicate, holding twenty-five shares.

(2) He was liable on his covenant to indemnify Bicknell in respect of the first mortgage of \$47,345, and on his direct covenant in the second mortgage for \$28,647.

(3) It was at least a debatable and open question whether Wallace was legally entitled to receive and retain the profit of \$75 per acre taken by him on the sale to the syndicate.

I pause here to express the opinion that Wallace was a promoter of the syndicate and of the defendant company which succeeded it; that, as vendor-promoter, he was bound to make to the members of the syndicate the fullest disclosure as to the price paid by him and the profit he was taking; and that, having failed to make such disclosure, he was probably liable in an action for damages by the company for the non-disclosure. (See the judgment of Strong, C.J., in *In re Hess Manufacturing Co., Edgar v. Sloan* (1894), 23 S.C.R. 644, at pp. 657 and 658, and at p. 667. Reference may also be made in this connection to the case of *In re Leeds & Hanley Theatres of Varieties Limited*, [1902] 2 Ch. 809, at p. 825; *In re Olympia Limited*, [1898] 2 Ch. 153, at p. 179; and *In re Cape Breton Co.* (1885), 29 Ch. D. 795; S.C., *sub nom. Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652).

(4) Fullerton and Doran were the controlling factors in the syndicate, and were in charge of the incorporation and organisation of the defendant company, the allotment of its shares, the appointment of its board of directors, and generally had the conduct of its affairs. In particular it would rest largely with them to say whether any proceeding should be taken against Wallace for recovery by the syndicate or by the company of the profit retained by him.

I find that prior to the payment on the 29th May, 1914, there was no disclosure to shareholders of the payment to Doran of the commission, \$8,121.22; that some intimation was made regarding it in a letter dated about the 1st June, 1914; and that further disclosure was afforded at the meetings of shareholders held on the 18th September, 1914, and the 4th November, 1914.

I find that, when the plaintiff, on or about the 29th March, 1914, received from the defendant company a cheque for \$1,425 (see exhibit 9), he was aware of such facts as shewed that this cheque consisted in some part of a return of capital, and that, without making an accurate computation, he retained the full

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amount so received by him, believing that it consisted in part of a return of capital. I refer in connection with this finding to the evidence of Doran and to the depositions of the plaintiff on his examination for discovery, questions 250-264 and 273-275.

Upon the above statement of facts, I proceed to deal in the first instance with the third claim put forward by the plaintiff, namely, that the individual defendants, as directors of the company, illegally declared and paid out a dividend of 57 per cent., thereby impairing the capital of the company; and praying that the individual defendants should be required to repay to the company the said sum to the extent to which it was paid out of the capital of the company.

It is entirely plain that the payment of this dividend to the extent of \$11,020.28 was *ultra vires* of the directors, not only in the narrow sense of that term, but in its broad and strict sense, and that the act of the directors in this respect was incapable of ratification by the shareholders. Other proceedings, either under sec. 15* of the Ontario Companies Act or by way of voluntary winding-up, might have been taken so as to reach the same result in a legitimate manner; but such proceedings have not been taken; and, even if taken, they would not be a ratification of the distribution already made, but would be entirely new and different proceedings.

The passing of the by-law which was passed on the 4th November, 1914, and confirmed by the shareholders, was entirely ineffective to produce any operative result or any condition under which the dividend might be paid, unless and until it had been confirmed by the Lieutenant-Governor in Council. The fact was that on the 4th November, 1914, the defendant company had debts and obligations then outstanding which had not been provided for or protected within the meaning of sec. 15; so that

* 15.—(1) Where a corporation has ceased to carry on business except for the purpose of winding up its affairs and has no debts or obligations that have not been provided for or protected the directors may pass by-laws for distributing the assets of the corporation or any part of them among the shareholders.

(2) The by-law shall not take effect unless or until it is confirmed by a two-thirds vote of the shareholders present in person or by proxy at a general meeting duly called for considering the same and by the Lieutenant-Governor in Council.

the fundamental condition under which that section could be brought into force and made operative did not exist. Sub-section 2 provides that the by-law shall not take effect until it is confirmed by the Lieutenant-Governor in Council; and no order in council has been passed confirming it.

I am therefore of opinion that the original illegality which existed with respect to the payment of this dividend still continues, and that in an action properly constituted for that purpose the directors would be liable to have judgment pronounced against them directing them to repay to the company the sum of \$11,020.28 above mentioned.

But the defendants contend that, even admitting the payment of this dividend to have been illegal, and admitting that the subsequent action of the shareholders in confirming it was ineffective, the plaintiff is personally incompetent to maintain this action, he having himself received his share of the 57 per cent. dividend, being the sum of \$1,425 paid to him on the 29th May, which sum he received and still retains, knowing, as I have found, that in part at least it consisted of a return of capital.

It appears to be plain, under the principle established in the case of *Towers v. African Tug Co.*, [1904] 1 Ch. 558, that under these circumstances the plaintiff is personally incapacitated from maintaining this action. In that case the account of a limited company, at the commencement of their financial year, in 1900, shewed a considerable debit balance on the previous year's trading, but the directors illegally, though honestly, applied a profit made in the earlier part of 1900 in payment of an interim dividend, instead of in reduction of the debit balance, thus, in effect, paying a dividend out of capital. The balance-sheet for 1900, shewing the debit balance and also the payment of the dividend, was submitted to and approved by the shareholders in general meeting. Subsequently, the directors, recognising their mistake, proposed to apply any future profits in wiping out the debit balance, and this was almost entirely accomplished out of profits in 1901 and 1902, as appeared from the balance-sheets for those years, submitted to and approved by the shareholders in general meeting. In 1903, two of the shareholders who had themselves received their portions of the dividend, and concurred in passing the balance-sheets, commenced an action "on behalf of themselves

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and all others the shareholders of the company" against the company and the directors to compel the directors to repay to the company the amount of the dividend. On appeal from the judgment of the trial Judge, the case was heard before a Court of Appeal consisting of Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.

Vaughan Williams, L.J., at p. 566, after stating the facts, says: "In that state of things, what ought to be done with this action? There is no doubt that the payment of this interim dividend was an *ultra vires* payment. I start with the assumption one is bound to make, that if an act is done by a company which is *ultra vires*, no confirmation by shareholders—not even by every member of the company—can convert that which was *ultra vires* into something *intra vires*: it always must be *ultra vires*. As is pointed out in one or two of the cases, the result of that is that if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the reinstatement of things in the position in which they would have been but for the *ultra vires* act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming this case to be one of those in which the facts have been such that an individual shareholder ought to be able to sue in a representative action for the purpose of preventing acts being done in reference to the company in which the shareholders are interested, and which might damnify the company by reason of those acts being *ultra vires*. I assume that an action not only to prevent *ultra vires* acts in the future but also to remedy acts that have been done *ultra vires* is an action which can be brought in the form in which this action is brought. But although that is so, my own opinion is that this is a kind of action which has to be brought by a plaintiff personally. It is an action which he cannot bring unless he has an interest; it is an action which a stranger could not bring. Under those circumstances, what is it we have to ask ourselves here? If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, received their dividends with knowledge of all the facts, and then brought this action with the money still in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is, to my mind, an action such as

they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires* if he himself has in his pocket at the time he brings the action some of the proceeds of that very *ultra vires* act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others."

Stirling, L.J., after stating that he desired to rest his decision on the particular facts in the case, and to abstain from laying down, so far as possible, any general rules respecting the questions raised, says, at p. 571: "I think, on the whole, that justice would have been done if the action had been dismissed on the ground that the personal conduct of the plaintiffs was such as to preclude them from insisting on the relief which they claim."

Cozens-Hardy, L.J., at pp. 571 and 572, says: "I will not pause to consider under what particular circumstances such an action may be maintained, but I assume that this is one of those cases in which such an action may be maintained—I mean in point of form. But I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action in this form must be a person who is really interested. When you get that fact clearly established it seems to me impossible to avoid taking the next step—that all personal objections against the individual plaintiff must be gone into and considered before relief can be granted. Here I think it is clearly proved, as it is certainly to be treated as admitted by the absence of any denial of the allegations in the counterclaim, that both the plaintiffs took this dividend with full notice of all the facts relating thereto. It is also clear that they had their dividends, which they took with full notice that they were payments out of capital, in their pockets at the date this action was commenced. Now, can a shareholder who has, with full notice of all the material facts, received part of the capital by way of a dividend, and who still retains that money in his pocket, maintain an action against the directors who have paid the dividend? I think the true answer to that question is, He cannot."

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Further on in his judgment he says (p. 572): "It seems to me . . . that a shareholder, having the money in his pocket which he knows is wrongfully there, ought not to be allowed to complain; and he cannot get any greater right of complaint because his action is, in form, an action by himself and all others the shareholders in the company. In fact, he must succeed by his own merits and not by the merits of the other shareholders."

The *Towers* case was decided by an exceedingly strong Court, and I can find no subsequent decision by which it has been in any way distinguished or modified. It therefore appears to me to lay down a principle of law that should be followed in our Courts; and the provisions of the Ontario Companies Act with respect to the payment of dividends make the situation here in Ontario stronger if anything than it is in England. I refer in that connection to sec. 95* of the Ontario Companies Act.

In the present case the plaintiff had not as full notice or knowledge of the facts as had the plaintiffs in the *Towers* case. Nevertheless (using the cautious language of Lord Justice Stirling), resting my decision on the particular facts in this case, and abstaining from laying down so far as possible any general rule, I am of opinion that the plaintiff has, by his action in receiving and retaining down to the present his portion of the dividend so paid out, with knowledge that it involved a repayment of capital, incapacitated himself from maintaining the claim now under consideration.

For reasons which have sufficiently appeared in the foregoing, the defendant company will be entitled to judgment on its counter-claim against the plaintiff for the return of so much of the dividend paid to him as involved an impairment of capital.

I next proceed to deal with the claim for repayment to the company of the commission paid to Doran.

Having regard to the facts as found above and to the provisions of sec. 92† of the Ontario Companies Act, this payment to Doran appears to have been, at the time it was made, entirely irregular and indefensible. See *Bartlett v. Bartlett Mines Limited*

* 95.—(1) The directors shall not declare or pay any dividend or bonus when the company is insolvent, or any dividend or bonus the payment of which renders the company insolvent or diminishes the capital thereof. . . .

† 92. No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting, or, if passed by the directors, until the same has been confirmed at a general meeting.

(1911), 24 O.L.R. 419, and cases there cited. The section has been construed to relate to any payments made to a director either in his capacity of a director or for services rendered by him to the company in some other capacity; and it seems to me that the result of the subsequent decisions is that the judgment of Rose, J., in *In re Ontario Express and Transportation Co.* (1894), 25 O.R. 587, must be taken to be overruled. It thus appears that, when this payment was made to Doran, the company immediately became entitled to maintain an action to recover it back.

With respect to the claim for payment to the company of the two sums of \$3,867.25 each, paid by Wallace to Fullerton and Doran out of the profits received by him, I note in the first instance that Wallace is not a party to these proceedings; and, even if he was a promoter at the time when he acquired the agreement from Bicknell, and even if he failed to make to the plaintiff and others such disclosures as are due from a promoter, I do not see how those circumstances give rise to a claim against Fullerton and Doran. It has never been held that such damages would form a trust fund in the hands of Wallace capable of being traced into the hands of Fullerton and Doran; and Fullerton and Doran were not, in my opinion, so identified with Wallace in any legal relationship as to make them directly liable for such non-disclosure. They were not joint owners or partners with Wallace—consequently they were not vendor-promoters.

But on the 14th March, 1914, there were outstanding all the various questions connected with the vendor to which I have already adverted, all of which were of great importance to Wallace, and all of which were largely in the control of Fullerton and Doran. In respect to these questions Fullerton and Doran owed their first duty to the subscribers to the syndicate whom they had brought into it; and the acceptance by them from Wallace as a gift of the sums of money now in question might render it practically impossible for them to protect the interest of the syndicate members as against Wallace.

Under these circumstances, I think it was not competent for Fullerton and Doran, promoters of the company and guardians of the interests of the syndicate subscribers, to receive, even as a gift from Wallace, the sums respectively paid to them.

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The rule respecting gifts to directors has been clearly formulated in various cases, and the principle is thus summarised in Hamilton's Company Law, 3rd ed., p. 352: "A director commits a breach of trust if he accepts, or is a party to the acceptance by his co-directors of, any money or property as a gift or bribe from persons dealing with the company, and is liable to repay to the company such money, or to account to the company for such property or its full value if parted with by the director."

At the time that these sums were paid by Wallace to Fullerton and Doran, they were not directors of the company, which had not yet been incorporated. None the less they stood in a fiduciary relationship to the members of the syndicate who afterwards became shareholders of the company; and I can see no reason why the general principle above enunciated with respect to directors should not be applied to them. For these reasons, I think that the sums received by Fullerton and Doran from Wallace were recoverable from them in an action properly framed for that purpose.

It thus appears that originally a cause of action did exist for the recovery of these moneys; but it is contended on the part of the defendants that the various by-laws and resolutions passed by the directors and shareholders of the company confirmed and validated the action taken; and that, if any cause of action originally existed, it has been effectively waived or cancelled by these resolutions. There can be no doubt that these various by-laws and resolutions, if within the power of the company to pass, and if in other respects validly enacted, are in their terms and construction sufficiently wide and sufficiently strong to ratify and confirm the various irregularities and illegalities in connection with the two branches of the plaintiff's claim now under consideration.

Whether it would have been necessary to implement them by an instrument to which Fullerton and Doran were parties, and executed under the corporate seal of the company, I do not pause to consider, as the question is disposed of on another ground.

It is to be noted that the writ of summons in this action having issued on the 30th September, these resolutions were passed on the 4th November, more than a month after the issue of the writ. Rule 159, however, provides that any ground of defence or counterclaim which has arisen after action, but before

the defendant has delivered his statement of defence, may be pleaded either alone or with other grounds of defence. The defendant is therefore entitled to set up by way of defence the resolutions above quoted.

The plaintiff, however, contends that the resolutions in question are ineffective; and he bases that contention on various grounds which I now proceed to state:—

(1) That, when the resolution in question was passed on the 4th November, 1914, the company had, by the payment in the preceding May of a dividend of 57 per cent., encroached upon its capital to a substantial extent; consequently that it was not, under these circumstances, competent for the directors, or even for the shareholders of the company, further to deplete the capital by giving up and releasing without consideration a valid and legal claim which the company then possessed against Doran and against Fullerton for the recovery back of these moneys. In other words, that there was no power in the shareholders or in the directors to make a gift to a director under these circumstances, and to do so was completely *ultra vires* of the company.

(2) That the meeting of shareholders at which these by-laws and resolutions were passed or confirmed was irregular and incompetent, because the notice calling the meeting was insufficient, and because certain proxies in pursuance of which votes were recorded were alleged to be invalid.

(3) That these payments were *mala prohibita* within the Secret Commissions Act, 1909 (D.), 8 & 9 Edw. VII. ch. 33; that the sums received by Doran and Fullerton constituted a secret profit; that Doran and Fullerton were agents within the meaning of the above Act, not only for the syndicate, but for the company to be formed; and that, the taking of the commission being illegal, it was incapable of confirmation by the shareholders in the manner attempted by them.

(4) That the commission to Doran, being secret, could not be ratified after he had received it, in view of the provisions of sec. 92 of the Ontario Companies Act.

(5) That at the time when these transactions occurred, and also when they were ratified by the shareholders, the company had no power to act as such (a) because the company was not regularly organised at its inception and the board of directors

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had been for a long period irregularly constituted, and (b) because it had at the time of the passing of the resolutions no license to transact business.

(6) That the ratification was an attempt by those in control to benefit themselves at the expense of the minority.

I deal first with the objection that the attempted release by the company of its claims against Fullerton and Doran was *ultra vires*. In the case of *In re George Newman & Co.*, [1895] 1 Ch. 674, N. was chairman of a company in which substantially all the shares were held by himself and his family. Out of the funds of the company, while it was a going concern, £3,000 was applied by N. to his own use, and a further £3,500 spent by N. out of the assets of the company upon his private house. These payments were made out of money borrowed by the company for the purpose of its business. They were sanctioned by resolutions of the directors, and were approved of by the shareholders. The articles contained no power to make presents to directors. In the winding-up of the company the liquidator took out a summons against N. to compel him to repay these sums to the company. The application came up on appeal before a Court of Appeal consisting of Lord Halsbury, Lindley, L.J., and A. L. Smith, L.J. The judgment of the Court was delivered by Lindley, L.J., and on p. 686 he says: "The shareholders, at a meeting duly convened for that purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity."

The opinion expressed in that case has been followed by our Court of Appeal in the case of *Re Publishers' Syndicate, Paton's Case* (1903), 5 O.L.R. 392, at p. 406, and views looking in the same direction have also been expressed in the case of *Hutton v. West Cork R.W. Co.* (1883), 23 Ch. D. 654, and *Stroud v. Royal*

Aquarium and Summer and Winter Garden Society (1903), 89 L.T.R. 243.

I think that the principle so laid down applies to this case. It is plain that, at the time when the meeting of shareholders was held on the 4th November, 1914, the company's capital was impaired; and I am of opinion that, in consequence, the shareholders of the company could not then make a gift out of its capital to any director; that such was the effect of the resolutions and by-laws then passed by them with respect to the payments made by Wallace to Fullerton and Doran in March, 1913, and with respect to the commission to Doran. Under these circumstances, the attempted action of the directors and shareholders in gratuitously releasing these claims was incompetent and invalid.

It is suggested that by-law 6 of the company's general by-laws warrants the action taken. That by-law is as follows: "6. Except in so far as the remuneration of the directors shall be fixed by this by-law, the directors themselves shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so."

But that by-law appears to relate exclusively to the remuneration to be paid to directors and to officers for their services in those respective capacities, and, in my opinion, has no relation to payments such as those in question. A perusal of the charter and of the provisions of the Ontario Companies Act shews that neither of them contains any specific provision which would warrant the passing of these by-laws or resolutions at a time when the capital is impaired.

The first ground of objection to the validity of the resolutions and by-laws of the 4th November being, in my opinion, valid, it is unnecessary and therefore undesirable for me to express any opinion on the remaining five grounds mentioned above.

I am therefore of opinion that the defendants' reliance on a release or discharge of any claim against Fullerton or Doran, or on an approval, ratification, and confirmation thereof by the shareholders, fails, and that the right of action which existed at the date when the writ was issued was not destroyed or otherwise affected by the resolutions and by-laws passed on the 4th November.

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There remains to be considered one further contention, namely, that the plaintiff is incompetent to maintain this action because it must be brought by the company itself. It is contended on the part of the defendants that, if the moneys in question are recoverable from Fullerton and Doran, they are the moneys of the company, and that therefore the company alone is entitled to maintain this action, while the fact is that in the action as constituted the company is a party defendant and opposes the plaintiff's claim, seeking to uphold and confirm the transactions which are attacked, and having on the 18th September, 1914, declined to sue.

It is further contended on the part of the defendants that, even though the shareholders of the company could not on the 14th November, 1914, effectively make a gift to Fullerton and Doran of those assets of the company which consisted of the company's claims against them, yet none the less the shareholders could achieve the same result by declining, as they did, on the 18th September, 1914, to permit an action to be brought in the name of the company for the recovery of these sums, and that such refusal is effective, the plaintiff being incapable of prosecuting the action either on behalf of himself or on behalf of himself and the other shareholders.

The defendants seek to apply the rule that "if an act, not *ultra vires* the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain, and the Court will not entertain the complaint except at the instance of the majority, and in a proceeding in which the corporation is plaintiff."

The defendants further contend that the remuneration of the promoters Fullerton and Doran for the services which they undoubtedly performed as promoters, and the remuneration of Doran as the agent who sold the company's lands, is within the powers exercisable by the company pursuant to the statute, charter, and by-laws under which it operates.

The principle is well established that in an action constituted as this is no relief will be granted by the Court if the transaction is such that it could be approved by the shareholders of the company. The question therefore is: can the majority of the shareholders place themselves in a position to approve these payments?

It is suggested that the impairment of capital might be made good, and the company, then being in a position to treat the claims in question as profits, could legally forgo and release them.

Whether or not such restoration of capital could be effected does not appear. No action to that end has been taken, and I think that the case must be determined as it stood at the time of the trial.

It seems plain to me that the rule invoked by the defendants applies only where the approval of the majority depends simply on the passing of a resolution or by-law which the shareholders are competent to pass, and does not apply where the shareholders must, as a condition precedent to approval, themselves acquire some further qualification or status which they may or may not be able to attain.

I think that the principle which applies is that a single shareholder, either alone or on behalf of himself and others, may make the company a co-defendant and may sue in respect of an act which is *ultra vires* the corporation, and which a majority are consequently unable to affirm. I refer as apposite examples of the application of this rule to *Cockburn v. Newbridge Sanitary Steam Laundry Co. Limited*, [1915] 1 I.R. 237; *Bennett v. Havelock Electric Light and Power Co.* (1910), 21 O.L.R. 120; *Burland v. Earle*, [1902] A.C. 83; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, at p. 69; *Hope v. International Financial Society* (1876), 4 Ch. D. 327; *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.* (1875), 1 Ch. D. 682; *Hichens v. Congreve* (1828), 4 Russ. 562.

The result is that the action of the plaintiff is maintained in respect of the sums paid to Fullerton and Doran by Wallace and in respect of the sum paid to Doran for commission, and these moneys will be repaid to the defendant company.

In respect to the sums first mentioned, the persons liable for such repayment are Fullerton and Doran, each for the sum of \$3,867.25.

No one among the other directors was responsible for the payment of these sums. The company had not in fact been incorporated, and the subsequent action of the directors in attempting ineffectively to ratify the payment does not, in my opinion, make them liable.

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With respect to the second sum of \$8,121.22 paid to Doran as commission, I think that each of the directors present at the meeting on the 29th May, 1914, namely, Doran, Fullerton, Murray, Bryan, and Gibson, is liable for the payment of this sum. The remaining defendant Ruckle, not having been present at the meeting, nor having in any way promoted the illegal payment, is not liable.

The plaintiff's claim in respect to payment of dividends out of capital is dismissed, and the company's counterclaim against the plaintiff is allowed.

The plaintiff will recover his general costs of the action as against all the defendants except Ruckle.

Ruckle recovers his proportionate share of the costs of defence against the plaintiff.

Judgment accordingly.

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[CLUTE, J.]

Oct. 3.

BROWN BROTHERS v. MODERN APARTMENTS CO. LIMITED.

Bills of Sale and Chattel Mortgages—Failure to Renew Chattel Mortgage—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 133, secs. 21, 23—Creditors of Assigns of Mortgagor—Possession Taken by Mortgagee—Sale by Mortgagee—Rights of Execution Creditors—Bill of Sale—Absence of Fraud—Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 3.

Under the plaintiffs' execution against M., the sheriff went to premises which had been occupied by M. to make a seizure of goods which had at one time been in possession of M.; the goods were claimed by R. under a bill of sale from B., whose title was under a chattel mortgage from H., who, after making the chattel mortgage, had transferred the goods to M.; B. had subsequently taken possession and sold to R., giving the bill of sale referred to. The plaintiffs impeached the chattel mortgage and bill of sale in order to enforce their execution against the goods. The chattel mortgage was made in 1911, and was then registered and the registration renewed in the following year, but not afterwards. The plaintiffs' judgment was obtained in August, 1915, and the attempt to seize was made in the same month:—

Held, that sec. 3 of the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, had no application to the case.

Held, also, that the plaintiffs, not being creditors of H., were not in a position to assert that the chattel mortgage had ceased to be valid by reason of non-compliance with sec. 21 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 133; and their position was not improved by a provision in the chattel mortgage enlarging the meaning of "mortgagor" and "mortgagee" so as to include the executors, administrators, and assigns of the mortgagor and mortgagee.

Held, also, that sec. 23 of the Act, as to taking possession, had no application to this case.

Held, also, that, B. having taken possession of the goods by placing a proposed purchaser in possession, before the plaintiffs had obtained judgment—the chattel mortgage being in default and there being no fraud—the subsequent sale to R. in September, 1915, was valid and the bill of sale unimpeachable by the plaintiffs.

THE plaintiffs, on the 25th August, 1915, recovered judgment against the defendants the Modern Apartments Company Limited for the payment of \$130 and costs. A writ of *fi. fa.* was issued upon the judgment and was returned *nulla bona*.

In this action the plaintiffs sought to set aside a certain bill of sale, dated the 18th September, 1915, whereby the defendant Barthelmes conveyed to the defendants the Royal Cecil Apartments Limited certain goods and chattels which, as the plaintiffs alleged, were the property of the defendants the Modern Apartments Company Limited, as a fraud on the plaintiffs and the other creditors of that company.

The title of the defendant Barthelmes to the goods was under a chattel mortgage from Hudson Brothers, made in April, 1911. The mortgage was renewed in the following year, but not afterwards. At a date subsequent to the mortgage, Hudson Brothers made a transfer of the goods to the defendants the Modern Apartments Company Limited. These goods the plaintiffs sought to reach under their execution as the property of that company. The defendant Barthelmes had taken possession of the goods and sold them to the defendants the Royal Cecil Apartments Limited, the sale being evidenced by the bill of sale impeached by the plaintiffs.

October 3. The action was tried by CLUTE, J., without a jury, at Toronto.

J. T. Loftus, for the plaintiffs.

T. H. Barton, for the defendant Barthelmes.

J. M. Ferguson, for the defendants the Royal Cecil Apartments Limited.

The defendants the Modern Apartments Company Limited did not defend.

At the trial, the plaintiffs obtained leave to amend by asking for a declaration that the chattel mortgage under which the defendant Barthelmes sold had ceased to be valid by reason of non-compliance with sec. 21 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135.

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CLUTE, J. (at the conclusion of the trial):—As I entertain no doubt about this case, no good purpose will be served, I think, by reserving judgment.

The plaintiffs' action is, in short, brought by them as execution creditors in regard to certain property which they say was exigible as against the defendants the Modern Apartments Company Limited. The debt had been incurred some time in July, and judgment was obtained on the 25th August, 1915, and execution placed in the sheriff's hands on the same day. We have the evidence of the sheriff's officer that, upon going to make a seizure of goods which had formerly been in the possession of the Modern Apartments Company Limited and in the premises which they had bought, he was informed that it was claimed by the other defendants, and thereupon refused to seize and sell without security, which was not given.

This action is brought—in effect, and wherein an amendment is necessary I allow it—to have it declared that these goods formerly in the possession of the Modern Apartments Company Limited were exigible under this execution.

In argument counsel has placed the case upon two grounds, as I understand it: first, under the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 3, formerly 13 Elizabeth.

I think it perfectly clear that that statute has no application whatever to the present case. The mortgage in question under which the defendant Barthelmes sold the property was given in 1911. It was renewed for one year. It was not subsequently renewed, and has not been renewed, and it is under and by virtue of a sale under that mortgage to the defendants the Royal Cecil Apartments Company that that company now claim the property.

It is further argued that, if the plaintiffs were not entitled to claim under that statute, they were entitled to claim upon the ground that the chattel mortgage, not having been renewed, was void: sec. 21 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135.

That section provides, so far as it is applicable to this case, that every mortgage registered in pursuance of the Act shall cease to be valid, as against the creditors of the person making the same, unless renewed in the manner specified. The persons who

made this mortgage were the Hudson Brothers, and they never were indebted to the plaintiffs, and the plaintiffs have no judgment or execution against them.

But it is said that this execution ought to be available because the mortgage itself provides that wherever the words "mortgagor" and "mortgagee" appear they shall be deemed to extend to the executors, administrators, and assigns of the mortgagor and mortgagee respectively.

I do not think those words can add anything to the statute, which refers to creditors of the person making the mortgage. There are no creditors of the persons who made this mortgage.

Section 23 provides that a mortgage or sale declared by this Act to be void or which, under the provisions of sec. 21—which I have just referred to—has ceased to be valid as against creditors and subsequent purchasers or mortgagees shall not by the subsequent taking of possession of the goods and chattels mortgaged or sold by the mortgagee or bargainee be thereby made valid.

It will be seen that this section has reference to sec. 21; and, if sec. 21 does not apply to the present case, so neither does sec. 23; and, therefore, as to taking possession, the case rests as if there had been no such sections passed, for the reason that they have no application to the present case.

Then what was done? I do not refer to the earlier taking of possession on the 18th, because I do not think it necessary, but to the possession taken by one Muirhead under the defendant Barthelmes, which was undoubted. So far as the evidence is before me, he was a proposed purchaser, he intended to buy, and he entered into possession under Barthelmes, and he collected the rents and was there for over a month. He entered into possession about the 20th August, and before judgment or execution obtained.

Therefore, Barthelmes was in possession, through his proposed purchaser, at the time that the plaintiffs' judgment was obtained and the execution put in the sheriff's hands. It is true that the proposed sale fell through, and that it was not until the 18th September that the sale was made to the Royal Cecil Apartments Limited; but I do not think that makes any difference; the mortgagee was in possession. His possession did not cease, and I think that, aside from the Bills of Sale and Chattel Mortgage Act, which does not apply, he had a perfect right as between

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him and the original mortgagor and as against all parties to take possession.

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The statute not applying, it is just the ordinary case of a mortgage of chattels; default having been made, the mortgagee takes possession and sells under that mortgage to the co-defendant. The statute not applying, in my opinion that is a perfectly valid sale, and the purchaser became entitled to this property.

There is no fraud in the case, so far as I can see; and the plaintiffs are not entitled to succeed. The action must be dismissed.

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Oct. 4.

[APPELLATE DIVISION.]

BANK OF OTTAWA V. CHRISTIE.

Promissory Note—Demand Note—Accommodation Endorsers—Advances by Bank—Defences to Action against Endorsers—Agreement for Payment—Evidence—Unreasonable Delay in Presentment—"Continuing Security"—Collateral Security—Assent of Endorsers—Bills of Exchange Act, sec. 181—Findings of Trial Judge—Appeal.

The judgment of MIDDLETON, J., *ante* 330, affirmed.

APPEALS by three of the defendants from the judgment of MIDDLETON, J., *ante* 330.

October 4. The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. B. Northrup, K.C., for the defendant Staples, appellant, and G. E. Kidd, K.C., for the defendants Kidd and Craig, appellants, argued that the plaintiffs had agreed at the time the security was taken that it should be paid out of the first money of the Schwab company, of which the defendants were directors, which came into the bank's hands, and that money, sufficient for that purpose, had come into their hands, but had not been applied according to the agreement. They also relied on secs. 180 and 181 of the Bills of Exchange Act, contending that the endorsers were discharged by reason of the note not having been presented for payment and protested within a reasonable time. The onus was on the plaintiffs to shew that the defendants were consenting parties to the delay, and that onus had not been met. The defendant Christie, who was not represented on the appeal, was the president

and active manager of the company, and therefore a biased witness on questions involving the responsibility of his co-directors. They referred to *Chartered Mercantile Bank of India London and China v. Dickson* (1871), L.R. 3 P.C. 574; *Banque du Peuple v. Denicourt* (1896), Q.R. 10 S.C. 428; *Merchants Bank of Canada v. Whitfield* (1881), 2 Dorion (Que.) 157; *Carter v. Flower* (1847), 16 M. & W. 743; *Ramchurn Mullick v. Luchmeechund Radakissen* (1854), 9 Moo. P.C. 46. Kidd's executors had advertised for creditors, and distributed their testator's estate. The defendants as sureties were absolved by the plaintiffs' laches.

Wentworth Greene, for the plaintiffs, was not called upon.

The judgment of the Court was delivered, at the conclusion of the argument for the appellants, by MEREDITH, C.J.C.P.:—It is very much to be regretted that the parties to this transaction did not put their agreement in writing, instead of leaving it in the exceedingly loose and unusual manner in which it is.

What we have to determine now is really only one question of fact, to be found upon the whole evidence adduced at the trial, having regard to the findings of the trial Judge respecting it, and remembering that he had the advantage of both seeing and hearing the witnesses; and that, unless we are convinced that he was wrong in his finding, we ought not to reverse it.

Mr. Northrup and Mr. Kidd have stated the case as fully and as forcibly as it could be stated; and no doubt just as they stated it to the trial Judge. Nothing has been left unsaid that could be said in favour of the appellants; yet we are not satisfied that the trial Judge was wrong, and that is enough for the purpose of this appeal. On the contrary, I am inclined to think that, if I had been in his place, I should have felt bound to find as he found.

There is, of course, the positive testimony of Mr. Staples that his note was to be paid out of the first moneys that should be paid in to the credit of the company. No one doubts, or has doubted, Mr. Staples' sincerity in giving his testimony, but we all know that it is natural for one much interested to grow to believe sincerely that to be true which, if true, would be much to his benefit; in this case, however, it would be unreasonable to discharge him upon his own testimony only; for myself I prefer

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to rely, generally, more upon the undisputed material facts and the strong probabilities of the case—circumstantial evidence.

The notes were unquestionably given as security to the bank; they were not “cashed” or “discounted” in the ordinary sense, they were, as I find, given and taken for the common and practically necessary purpose of establishing “a line of credit” for a comparatively new customer—indeed a new company, and so took the place of the more usual plainly expressed guaranty.

Starting thus, the rest of the circumstances become easily understood and are just such as one would expect. None of these careful business men who had given their own endorsement for the company’s benefit made any attempt to take the notes up at any time, but the notes remained, just as a written guaranty would, in the hands of the bank, as a continuing security for the company’s indebtedness. I cannot think that would have been if Mr. Staples’ present belief as to the nature of the transaction be accurate. The plaintiffs’ possession of his note gave a *prima facie* right of action upon it.

Then in the year 1915 a registered letter was sent to each of the three endorsers, shewing plainly the position taken by the bank in regard to these notes. Mr. Staples denies having received the letter sent to him, but the letters were registered, and, whether he received it or not, the others seem to have received theirs, and no objection was then made by any one to the bank’s stated position regarding the notes.

It is very improbable that the “line of credit” which was given would have been given if these notes did not constitute a continuing security to the bank for the liability of the company; it is probable that otherwise they would have been taken up; and it is not improbable that the letters referred to reached their destination; and, besides all this, I cannot read the testimony of the manager otherwise than as distinctly in conflict with that of Mr. Staples as to the terms on which the notes were taken by the bank.

The finding that the notes were given as a continuing security displaces also the other defence to this action, that is, the defence that the notes were not presented to the makers for payment within a reasonable time. The 181st section of the Bills of Exchange Act covers the case, providing, as it does, that: “If

a promissory note payable on demand, which has been endorsed, is not presented for payment within a reasonable time the endorser is discharged, provided that if it has with the assent of the endorser been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security."

So that the single question is: were the notes in question given as a continuing security? If so, they were still so held when presented for payment. I should probably have found on this question as the trial Judge found; and at all events I am quite unable to find that he was wrong.

The appeals must be dismissed.

Appeals dismissed with costs.

[BOYD, C.]

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Oct. 5.

Gift—Voluntary Bestowment in Joint Tenancy—Husband and Wife—Savings Bank Deposit—Survivorship—Will—Interests of Infant Devisee—Commuation of Benefits Charged on Land—Sanction of Court to Mortgage.

To create a voluntary bestowment in joint tenancy, as distinct from a gift *inter vivos* or *mortis causâ*, there must be unity of interest, unity of title, arising at one and the same time, and unity of possession—both joint tenants being seized *per mie et per tout*, each has an undivided moiety of the whole.

Where a man withdrew the money standing to his credit in a savings bank account, and redeposited it to the credit of a new account opened in the names of himself and his wife, giving the bank a written declaration, signed by both, that "all moneys deposited and that may be deposited by us and each of us to the credit of this account are our joint property, but they may be withdrawn by cheques made by either of us or the survivor of us," it was held, after the death of the husband, that the money was the property of the wife by right of survivorship.

The source of the money was immaterial, and after it became joint property it was not subject to being disposed of by the will of either party.

Re Ryan (1900), 32 O.R. 224, and *Everly v. Dunkley* (1912), 27 O.L.R. 414, applied and followed.

Certain personal rights given to the wife by the will of the husband were, by agreement among those interested, commuted to a block payment; and sanction was given, in the interest of the infant plaintiff, to the raising of the sum agreed upon by mortgage on the land devised to him in fee.

ACTION by the son and grandson of David Weese, deceased, for a declaration that certain moneys deposited with the defendants the Dominion Bank, in the savings department of their

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Napanee branch, formed part of the estate of the deceased and were subject to the dispositions of his will. There was also a counterclaim by the defendant Weese, the widow of David Weese, for a declaration of her rights under the will.

The action and counterclaim were tried by BOYD, C., without a jury, at Napanee.

E. G. Porter, K.C., for the plaintiffs.

J. L. Whiting, K.C., and *T. B. German*, for the defendants the Dominion Bank.

U. M. Wilson, for the defendant Weese.

October 5. BOYD, C.:—The controlling facts as given in evidence are these: the husband deceased was a farmer, and had from time to time deposited his savings in the Dominion Bank for a number of years, till they had reached the sum of \$1,913 in 1912. The account was in the savings branch, and stood in his own name, under the number 13022 in his pass-book. This number is the means of identification of the owner, whose name does not appear on it or in it. In June of that year he was minded to change the account and to place the aggregate in the joint names of himself and his wife, the defendant. This he did by going to the bank and giving directions which are demonstrated by the course of dealing between him and the bank. He signed a receipt for the whole amount in his individual account, and the bank transferred that very sum to a new account opened in the names of himself and his wife jointly under the new number 14695, and for which the usual pass-book so numbered was given to the husband, and by him taken home and kept at times by himself and at other times by his wife, but always in such a way as to be open and accessible to each of them. The evidence shews very clearly that he acted on his own motion, and made this voluntary bestowment of the money with the intent to benefit his wife and bring her in as joint owner. It is enough to refer to the document which was furnished by and left with the bank. It is a printed card in these terms:—

“To the Dominion Bank Savings Department.

“All moneys deposited and that may be deposited by us and each of us to the credit of this account are our joint property,

but they may be withdrawn by cheques made by either of us or the survivor of us." This is signed by husband and wife, and the date stamped upon it by the bank is "June 21, 1912."

On the 4th June, 1912, the husband signed a receipt to the savings department of having received thereout the sum of \$1,913. It is ear-marked as being account No. 13022.

This receipt of the money, its deposit to the new account, and the card of directions and instructions given to the bank on the 21st June, 1912, form parts of one transaction. The effect of it was to lodge the money to the joint account of husband and wife and to create a joint-tenancy or ownership therein, which at common law carried its own legal implications, and those concordant with the contents of the card.

Thenceforth the money was held to the joint account and for the joint usufruct of the two co-owners, to which kind of ownership the law attaches the right of survivorship to the one who lives, as to all that remains at the death of the one who dies.

It is immaterial as to the source of the money before its being deposited to the joint account; and, being so deposited, it is not subject to being disposed of by the will of either party. As put by Williams on Personal Property, pp. 451, 452, "the surviving joint owner will be entitled to the whole, unaffected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties" (17th ed., 1913). See also *Vance v. Vance* (1839), 1 Beav. 605.

The requirements to establish a gift *inter vivos* or a gift *mortis causâ* are distinct from those which go to create a voluntary bestowment in joint tenancy. In that case the four unities are looked for, and they co-exist in this case: viz., both have one and the same interest in the deposit, with unity of title, arising at one and the same time, and unity of possession—both being seized *per mie et per tout*, each has an undivided moiety of the whole.

In essentials the case is not distinguishable from *Re Ryan* (1900), 32 O.R. 224, and that case has been recognised and followed as well decided in many later decisions, of which the last is *Everly v. Dunkley* (1912), 27 O.L.R. 414.

The action is dismissed with costs from the time of filing the defence of each defendant.

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On the counterclaim the parties made an adjustment, by which, instead of administration, the widow commutes all personal rights given by the will as to fuel and provisions, use and keep of hens and cows, and use of horse and conveyance, to a block payment of \$1,500. To raise this amount by mortgage on the land I give sanction, as it is in the interests of the infant, who takes the fee.

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[APPELLATE DIVISION.]

DUFFIELD v. PEERS.

Master and Servant—Liability of Master for Negligence of Servant—Scope of Employment—Finding of Jury—Evidence.

The defendant P. was a sales-agent for the defendant company; he sold and delivered their wares, and was paid for his services by a commission on the price of the goods. There was nothing to shew whether he was bound to give any specified time to the sale and delivery. He was bound to use a horse and vehicle owned by an agent of the company, in selling and delivering some of the goods, and in some other work in regard to them, and to pay the owner, through the company, hire for the use of the horse and vehicle, which, he said, were not used by him for any other purpose. P. was driving the horse and vehicle to the place where they were kept, after his day's work was done, when the horse ran into the plaintiff upon the highway and injured him. It was found by the jury that P. was blamable for the injury; and it was *held*, that there was evidence upon which reasonable men might find that P. was, at the time of the injury to the plaintiff, acting within the scope of an employment by the company and doing his duty under their directions, although also engaged in his own business of earning his commission; and a judgment for the plaintiff against the company was affirmed.

APPEAL by the defendants the Computation Scale Company from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of \$2,500 damages and costs, in an action for damages for injuries sustained by the plaintiff by being thrown down by a horse driven by the defendant Peers in a city highway, which the plaintiff was attempting to cross on foot, by reason of the negligence of the defendant Peers, who was employed by the appellants.

There was evidence that Peers was engaged with the horse and conveyance upon the business of the appellants when the injury to the plaintiff was caused; but the circumstances of the employment were peculiar; they are indicated in the judgment below.

The question raised by the appeal was, whether the appellants were liable for the negligence of Peers.

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September 21. The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

M. C. Cameron, for the appellants, argued that, under the circumstances of the case, the plaintiff should have been nonsuited, as the evidence shewed that the appellants were not masters, nor was Peers a servant, in such a sense as would make the former liable for the tort of the latter. Peers was an agent selling scales on commission, and the horse used by him was not the property of the company.

D. L. McCarthy, K.C., for the plaintiff, the respondent, argued that Peers was an agent of the appellants, using the horse, partly for his own benefit, and partly for theirs. The enterprise was one in which Peers and the appellants had a joint interest and a joint benefit, and that was sufficient on the authorities to fix liability on the appellants. Peers never used the horse for his own pleasure. Counsel referred to *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, *per* Willes, J., at p. 265; Halsbury's Laws of England, vol. 1, pp. 211, 212, where the principle is stated as applying alike to the relation of master and servant and to that of principal and agent; *Ward v. General Omnibus Co.* (1873), 42 L.J.C.P. 265; Halsbury, vol. 20, pp. 248, 249, 250, 256. Mr. C. B. Labatt also deals with the subject at great length in his well known work on Master and Servant. The basis of our claim is the joint interest and joint profit of principal and agent.

Cameron, in reply.

October 6. The judgment of the Court was delivered by MEREDITH, C.J.C.P.:—Cases of this kind present difficulties enough even when the evidence is well-directed to the real points in the case, and all that is available is adduced; they become much more difficult when slipshod methods only are applied, and one is obliged to grope, much in the dark, for the facts which are to govern them; but the parties chose to leave this case as it was when it went to the jury, and to be presented to the jury, as it was, without objection of any kind; and so we must deal with it, however unsatisfactory the material upon which it has to be considered may be.

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The one question now involved is: whether there was any evidence upon which reasonable men could find, as the jury in this case did find, that the man who was found by the jury to be in law blamable for the accident, which is the subject-matter of the action, was, at the time of the accident, acting within the scope of an employment by the appellants.

He was what is called "a sales-agent;" he sold and delivered the appellants' wares, being paid for his services by way of a commission on the price of the goods sold only. There is nothing in the evidence to shew whether he was bound to give any specified time to the sale and delivery of the goods; for aught that appears in evidence, directly, he may have been under no obligation in this respect. He was bound to use a horse and conveyance owned by an agent of the company, in selling and delivering some of the goods, and in some other work, apparently, about them, and to pay the owner, through the appellants, hire for the use of such horse and conveyance; and the plaintiff's injury, for which large damages have been awarded, was caused in a collision with the horse which the man, in the conveyance, was then—it is said—driving back to their stables after his day's work was done.

The evidence relating to this question is extremely meagre: the appellants' general manager testified that the man was: one of the appellants' agents; selling for them "on commission;" and that "his territory" was "anywhere we had a mind to send him;" that the "horse and rig" before-mentioned belonged to J. H. Davidson, who is also employed by the company; that the man used them in his work, and paid Davidson, through the company, for such use: and the man testified that they were not used by him for any other purpose; that in the first instance he was told by the "sales-manager" to use the horse and conveyance, and that he was then under his "authority" and "control:" and it seems to have been admitted that when the accident happened the horse and conveyance were being driven back to their stables, by the man, after his day's work was done.

Upon this evidence reasonable men might find that the man was, when the accident happened, about his employers' business and conforming to the terms of his contract with them, as well as about his own business of earning his livelihood by the commissions he won in doing the work involved in selling and delivering

his employers' wares, and such other services as he performed respecting them, about which the evidence is very far from clear.

It may be that they could not have commanded him to go upon the business he was then about, or to be where he was when the accident happened; but, being there upon their business, even if at the same time in his own interests and at his own choice, there was evidence upon which it could be found that his acts in and about that business were, as to third persons affected, their acts, and none the less so because he paid hire for the horse and conveyance; if they were his own, and he was to provide them, as well as his own services, in his employment, that would not necessarily exclude him from being in the service, and acting in the place, of his employers. There was also some evidence upon which reasonable men could find that, in using the horse and conveyance generally, he was acting under the directions of his employers, and that it was part of his duty to them, under such directions, to return the horse and conveyance to the stables, as he was doing when the accident happened.

Some of the cases under the Imperial Workmen's Compensation for Injuries enactment are helpful to the plaintiff on the question of the scope of the man's employment; but it is always to be borne in mind that, having regard to the purposes of such enactment, a very liberal interpretation has been given often, as might be expected, to the words "arising out of and in the course of the employment:" see *Duck v. North Sea Steam Trawling Co. Limited* (1915), 9 B.W.C.C. 83, [1915] W.C. & I.R. 529; *Parker v. Owners of Ship "Black Rock"*, [1915] A.C. 725; *Richards v. Morris*, [1915] 1 K.B. 221; and *Edwards v. Wingham Agricultural Implement Co. Limited*, [1913] 3 K.B. 596; and see also *Whatman v. Pearson* (1868), L.R. 3 C.P. 422, and *Turcotte v. Ryan* (1907), 39 S.C.R. 8.

The verdict cannot be disturbed, and consequently this appeal must be dismissed.

Appeal dismissed with costs.

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RE TORONTO AND HAMILTON HIGHWAY COMMISSION AND CRABB.

Highway—Expropriation of Land for—Toronto and Hamilton Highway Commission Act, 5 Geo. V. ch. 18, sec. 10 (O.)—Public Works Act, R.S.O. 1914, ch. 35, secs. 27, 29, 31, 32—Compensation—Award or Decision of Ontario Railway and Municipal Board—Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, secs. 9, 52—Leave to Appeal to Appellate Division—Evidence—Conduct of Members of Board—Consultation with Member not Present at Hearing—Benefit from New Highway—Access—Frontage Tax—Set-off.

By the Toronto and Hamilton Highway Commission Act, 5 Geo. V. ch. 18, sec. 10 (O.), the Commission may expropriate land, and "shall have and may exercise the like powers and shall proceed in the manner provided by the Public Works Act, where the Minister of Public Works takes land or property for the use of Ontario and the provisions of that Act shall *mutatis mutandis* apply."

Held, having regard to secs. 27, 29, 31, and 32 of the Public Works Act, R.S.O. 1914, ch. 35, that when the Ontario Railway and Municipal Board acts in fixing compensation for land expropriated by the said Commission, it does so as a Board or Court, exercising the powers given to it by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186; and there is no pretence for saying that the members of the Board act as arbitrators merely.

Therefore, where two members of the Board, who had heard the evidence upon a proceeding before the Board for the purpose of fixing compensation for land expropriated for a new highway, allowed the third member, who had not heard the evidence nor previously taken part in the inquiry, to read the evidence and express his views regarding the case to them, before giving their decision, it could not be said that the decision was thereby vitiated: LENNOX, J., *dubitante*.

Quære, whether the Board was within its powers under sec. 9 or sec. 52 of the Ontario Railway and Municipal Board Act.

A Divisional Court of the Appellate Division refused leave to appeal from the decision of the Board in regard to compensation, being of opinion, after a full discussion and consideration of the evidence, that the amount awarded was reasonable and just.

Per HODGINS, J.A.:—Properties fronting on the new road and those benefited by it are to be assessed. Access is a special benefit, and its value may be set off as direct, while the advantage gained by proximity, though paid for by assessment, may still be general in its effect.

APPLICATION by Crabb, the claimant for compensation as land-owner, for leave to appeal, under sec. 32 of the Public Works Act, R.S.O. 1914, ch. 35, from an award or decision of the Ontario Railway and Municipal Board fixing the compensation to be paid to the applicant for land expropriated for a new highway connecting the cities of Toronto and Hamilton; and motion on behalf of the Toronto and Hamilton Highway Commission for leave to cross-appeal.

September 22. The motions were heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, J.J.A., and LENNOX, J.

W. Laidlaw, K.C., for the claimant, argued that the Board should have allowed compensation in respect of the frontage tax that would be charged against the land-owner on both sides of the road: *Re Richardson and City of Toronto* (1889), 17 O.R. 491; *The Queen v. Murray* (1896), 5 Can. Ex.C.R. 69; *The Queen v. Carrier* (1888), 2 Can. Ex. C.R. 36. So far from being a benefit, the road is really a detriment to the land-owner in this case, and no deduction should be made from his compensation on this account. The Board should have allowed him at least \$1,000 per acre, an amount that is justified by the evidence of the witnesses, which should be the foundation of the award. The members of the Board who heard the case pursued an improper course in consulting with Mr. Kittson, another member of the Board, who did not sit at the hearing, but nevertheless was given the papers by the members who did sit, and made a secret report thereon which was read by these members, and is in reality their award. [HODGINS, J.A., referred to sec. 9 of the Ontario Railway and Municipal Board Act, which authorises a reference by the Board to one of its members to report upon any question or matter arising in connection with its business.] That is not what was done in this case. The members of the Board are arbitrators, and such cases as *Conmee v. Canadian Pacific R.W. Co.* (1888), 16 O.R. 639, are in point. The claimant is also entitled to compensation for the loss of the excellent water supply which he has enjoyed for many years, and which has been cut off by the Commission. Far too small a sum has been allowed in respect of severance. The whole weight of the evidence shews that the award is too low.

H. E. Rose, K.C., for the Commission, said that it was a public body, whose sole object was to do what was right and just between the parties. In case the leave applied for was given, the Commission wished to have leave to cross-appeal. The value of the claimant's land had in fact been greatly increased by the building of the road. When the claimant asks for damages for severance, he is making a demand which is inconsistent with the rest of his claim. As to the question of water supply, the Commission is willing to grant the applicant an easement to secure this. As to Mr. Kittson's report, he referred to sec. 32 of the Public Works Act. The claimant cannot have the award set aside on such a

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ground. The Board has acted on the evidence which it accepted, as it had a right to do.

Laidlaw, in reply, argued that ample grounds had been shewn for granting the right of appeal, which was all that was asked for on the present motion.

October 6. MEREDITH, C.J.C.P.:—The one substantial purpose of this motion, for leave to appeal against an award of the Ontario Railway and Municipal Board, is that the compensation awarded to the applicant may be increased; and the prolonged argument in support of it was directed mainly and properly to that subject, and the evidence bearing upon the several items of the applicant's claim was referred to at great length for the purpose of shewing that there had been an under-estimation of the applicant's losses upon all of the items of his claim: and in taking that course Mr. Laidlaw was right, because, unless we are convinced that there is good ground for thinking that some substantial injustice may have been done to the applicant in the amount awarded to him, leave to appeal ought not to be given: if full compensation has been awarded, the means by which that end was accomplished, whether regular or irregular, are unimportant to the parties concerned. The final result of an appeal such as this, in which all that could be said on each side has been said, should be the fixing of the proper amount of compensation finally in this Court, if the Board has failed in its efforts to do so: if the Board has succeeded, nothing can be gained by giving leave to appeal.

And, having given careful attention and consideration to all that was urged against the award, in respect of the amount awarded especially—and very much was said—I am fully convinced that the Board dealt with the applicant's claim, in all its particulars, in not only a fair but in a generous manner; indeed the more that was said, and the more consideration given, the more convinced one became that if there be cause for complaint as to the sum awarded it is not on the applicant's side.

One cannot, having regard to the evidence and all the circumstances of the case, but think that if the land had the extravagant value put upon it by the owner, and by some of his witnesses, such value would be largely attributable directly to the new road in question bringing it, in time and comfort of travelling, so

very much nearer to Hamilton and Toronto, and so available as homes, temporary or permanent, for those engaged in business in one or other, or both, of those places; and so, if such values were real, instead of paying compensation, the builders of the road should receive it, or at least some expression of appreciation.

But such values are not real, they are, I find upon the whole evidence, but fanciful: the belief that they exist being born of the desire that they should, for the advantage it would be to them who dream such dreams, and sometimes speculate on the chances of such things coming true.

As the Board did, so do I, place much more dependence upon the testimony of the witness Flett, and the actual pertinent facts deposed to by him, than upon the evidence of any land speculator who had no dealings in lands in the locality; naturally such witnesses take exalted views of the speculative value of properties; they are sellers, and their whole happiness depends upon high prices.

Mr. Laidlaw has entirely failed to convince me that any injustice has been done to the applicant in the amount awarded to him, and so it becomes unnecessary to consider any question of irregularity in the making of the award, for the reasons I have already stated.

But in regard to the matter relied upon by him as vitiating the award altogether, I feel bound to add that I am not yet able to agree with him. The Board is composed of persons occupying positions analogous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they—that is, those members of the Board who heard the evidence and made the award—allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them. Whether the Board was within its powers under the 9th, or under the 52nd, section of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, need not be considered, and so should not be; but it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such dis-

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cussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed.

The motion for leave to cross-appeal was, I understood, born of the motion for leave to appeal, and is to die a natural death if that motion be now strangled; both must accordingly be dismissed.

But the dismissal should be only on the respondents carrying out, if the applicant desires it, their offer to connect together the tile drains on each side of the new road by means of water-tight pipes under or through the road. The Board seems to have been under the impression that there was no flow of water from those above to those below where the road now is, and so such a connection would answer no useful purpose; but there is a possibility that it might, and the land-owner should have the benefit of the doubt; and counsel's rejection of the offer, at one time, is not sufficient reason for depriving the land-owner of another chance to accept it: see the Ontario Public Works Act, sec. 38.

MAGEE, J.A., agreed in the result.

HODGINS, J.A.:—This was an application by the land-owner, under sec. 32 of the Public Works Act (R.S.O. 1914, ch. 35), for leave to appeal. The reasons for the application were very fully discussed, so that the Court in fact considered the matter as if leave had been granted. In addition to this, a very full brief of argument and evidence has been submitted by Mr. Laidlaw.

A question was raised by him that, under the Public Works Act, when the Ontario Railway and Municipal Board acts in fixing compensation, it does so through its members as arbitrators. By the Toronto and Hamilton Highway Commission Act (5 Geo. V. ch. 18, sec. 10) the Commission may expropriate land, and "shall have and may exercise the like powers and shall proceed in the manner provided by the Ontario Public Works Act, where the Minister of Public Works takes land or property for the use of Ontario and the provisions of that Act shall *mutatis mutandis* apply." In the course of carrying out that Act, the Ontario Railway and Municipal Board have many duties cast upon them of finally settling disputes. The work is a public one, and the

Province of Ontario and the various municipalities contribute towards its cost, and they are interested in the amount paid to the different land-owners.

The sections of the Public Works Act giving rise to the contention set up are the following:—

“27. The Minister and the owner may agree upon the amount of the compensation, or either party may give notice in writing to the other that he requires the amount of such compensation to be determined by arbitration under the provisions of this Act.”

“29. Where the Minister gives notice to the owner, either before or after the service of the appointment upon him, that he desires that the compensation shall be determined by the Ontario Railway and Municipal Board instead of by the Judge, the Chairman of the Board shall give the appointment upon the like application and shall have power to give like directions as the Judge might have given under the next preceding section and the proceedings shall thereafter be taken before the Board.”

“31. The provisions of the Ontario Railway and Municipal Board Act shall apply to proceedings taken before that Board under this Act.”

“32.—(1) Where the amount of the claim exceeds \$500, the Minister or the claimant may by leave of the Appellate Division appeal to that Court from any determination or order of the Judge or of the Board under this Act as to compensation.

“(2) The leave may be granted on such terms as to the appellant giving security for costs and otherwise as the Court may deem just.

“(3) The practice and procedure as to the appeal and incidental thereto shall be the same *mutatis mutandis* as upon an appeal from a County Court.

“(4) The decision of the Appellate Division shall be final.

“(5) Section 48 of the Ontario Railway and Municipal Board Act, 1906, shall not apply to any appeal under this section.”

These provisions seem to lay down a very clear procedure. The parties may agree, or, if they do not, either party may give notice that he requires the compensation to be determined by arbitration. If, however, the Minister—or in this case the Commission—before or after service on him of the County Court Judge’s appointment at the instance of the land-owner—gives

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notice that he desires that the compensation shall be determined by the Ontario Railway and Municipal Board, instead of by the County Court Judge, then the Chairman of the Board gives a new appointment, and the proceedings are thereafter to be taken before the Board. In that case, by sec. 31, the provisions of the Ontario Railway and Municipal Board Act apply, except sec. 48, under which an appeal would be limited to questions of law.

I cannot take all this as meaning that the proceedings before the Board are other than according to its powers under its own Act. In that case it is not an arbitration. If it were otherwise, why would the provisions of the Arbitration Act be excluded? They apply when the County Court Judge officiates. He deals with the matter as an arbitrator, as he does in certain claims for compensation under the Municipal Act. But the Board has its own procedure, and carries it on more as a Court and not as if its members were sitting as a board of arbitration.

It is no unusual thing for claims against the Crown to be fixed by a Court instead of by arbitrators.

To deal with the matter as suggested by counsel for the landowner would, I fear, lead to complications and reduce the powers of the Board in many respects. In the Ontario Railway and Municipal Board Act (R.S.O. 1914, ch. 186) special provisions are found which are necessary if the Board is to accomplish its work, such as secs. 6, 7, 8, 9, and 10. These sections fix the quorum of the Board, enable the Vice-Chairman to act for the Chairman, and authorise any member to be detailed to report upon matters pending before the Board. Section 21, sub-sec. 4, and sec. 38, practically confer upon the Board the status and powers of a Court. Section 22 gives it exclusive powers in matters properly before it, and enables the Crown to be represented before it or before a Divisional Court upon any appeal.

It is the provisions of this Act which are specifically applied to the process of fixing the compensation in this case, and I am wholly unable to see why they should be considered as nullified either by the fact that it is usual for compensation to be determined by arbitration or because in one event that would be the course followed under the Highway Act.

I have heard and read with care the very complete arguments submitted, and can find no real reason why the amount fixed,

taken in connection with the undertaking given at the hearing, should be interfered with. The only point as to which I had a doubt, namely, the setting off the special benefit against the capital value of the frontage tax, is, I think, satisfied by considering the incidence of the tax. Properties fronting on the new road, and those benefited by it, are to be assessed. Access is a special benefit, and I can understand why its value might be set off as direct, while the advantage gained by proximity, though paid for by assessment, might still be general in its effect.

The application for leave should be dismissed with costs.

LENNOX, J.:—I agree in the conclusion reached by the learned Chief Justice as to the disposal to be made of these applications; but, with the very greatest respect, I am not at present able to agree that the action of the two members of the Board in submitting the evidence to the third and consulting with him was proper or justifiable.

Motions dismissed.

[IN CHAMBERS.]

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Interpleader—Parties to Issue—Who should be Plaintiff—Onus—Husband and Wife—Possession of Married Woman—Primâ Facie Right—Ownership of Land and Goods.

A sheriff having seized goods under an execution against a married man, the goods were claimed by his wife, and an interpleader issue between the execution creditor and the claimant was directed to be tried:—

Held, that the execution creditor was properly made plaintiff in the issue, the claimant being the owner of the house in which the goods were seized, and so in apparent possession of them; and it made no difference that her title to the house and land was attacked by the execution creditor in another proceeding still pending, for it was not to be assumed that she would not maintain her title.

Farley v. Pedlar (1901), 1 O.L.R. 570, and *Hogaboom v. Grundy* (1894), 16 P.R. 47, followed.

A married woman now stands in the same position as any one else; and, once it is shewn that the goods are actually in her possession, *primâ facie* they are hers as against all the world.

Dictum of STRONG, J., in *Crowe v. Adams* (1892), 21 S.C.R. 342, 344, dissented from.

Discussion as to the form of an interpleader issue is usually idle: *Bryce Brothers v. Kinnee* (1892), 14 P.R. 509, 510, 511.

APPEAL by the execution creditor from that part of an interpleader order made by the Master in Chambers which directed

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that the appellant should be plaintiff in an interpleader issue between the appellant and the claimant, the wife of the execution debtor; the interpleader application having been made by a sheriff who had seized goods under the execution.

October 6. The appeal was heard by MIDDLETON, J., in Chambers.

R. L. McKinnon, for the execution creditor, appellant.

Goetz, for the claimant.

P. Kerwin, for the sheriff.

October 6. MIDDLETON, J.:—In this case the wife, being the owner of the house, was in apparent possession of the goods, and the execution creditor is rightly the plaintiff in the issue: *Farley v. Pedlar* (1901), 1 O.L.R. 570.

When the husband is the owner or tenant of the house, the goods are in his apparent possession, and the wife is rightly plaintiff: *Hogaboom v. Grundy* (1894), 16 P.R. 47.

The execution creditor, it is true, has, in another proceeding, attacked the wife's title to the land; but this can make no difference—it cannot in the meantime be assumed against her that she will not succeed in maintaining her title.

At the trial, no doubt, the claimant must face the difficulty there always is in satisfying the Court that property acquired during coverture is that of the wife; but the dictum of Strong, J., in *Crowe v. Adams* (1892), 21 S.C.R. 342, at p. 344, that the goods found in the possession of the wife are *primâ facie* the goods of the husband goes altogether too far.

The better view is that a married woman now stands in precisely the same position as any one else; and, once it is shewn that the goods are actually in her possession, *primâ facie* they are hers as against all the world. The real difficulty may be to ascertain whether the husband or wife has possession. Here the wife, being the owner of the land, is in possession.

Clearly the onus is upon the execution creditor in his attack upon the wife's ownership of the land—why should it not also be so in his attack on the ownership of the goods?

As a rule nothing is more idle than these discussions as to the form of an interpleader issue. As pointed out in *Bryce Brothers*

v. *Kinnee* (1892), 14 P.R. 509, 510, 511: "Whatever be the form, the substance must be looked at . . . The object of the issue being to inform the conscience of the Court, it is immaterial for that purpose which party is made plaintiff."

If the wife were plaintiff, and she proved that the goods were in her possession at the time of the seizure, the onus would then shift to the execution creditor to displace the presumption of ownership implied from the fact of possession.

The appeal is dismissed with costs to be paid by the execution creditor to the claimant in any event.

The sheriff had no interest in the question, and should have no costs.

[APPELLATE DIVISION.]

UPPER CANADA COLLEGE v. CITY OF TORONTO.

Assessment and Taxes—Local Improvements—Liability of Upper Canada College—Exemptions—Municipal By-laws—Petition—Validity—Local Improvement Act, R.S.O. 1914, ch. 193, secs. 12, 47—Upper Canada College Act, R.S.O. 1914, ch. 280, sec. 10—Assessment Act, R.S.O. 1914, ch. 195, secs. 5, 6—Conflict of Statutory Provisions—Rule of Construction.

The collection of money for local improvements pursuant to the Local Improvement Act, R.S.O. 1914, ch. 193, is taxation; and the provision of sec. 10 of the Upper Canada College Act, R.S.O. 1914, ch. 280, exempts the college from taxation—which includes local improvements—if lands of the Crown are likewise so exempt. Crown lands are exempt from taxation under the Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (1); the exemption is not cancelled or varied by the Local Improvement Act or otherwise; and hence Crown lands are not subject to taxation for local improvements, and neither are the lands of Upper Canada College.

The provisions of sec. 47 of the Local Improvement Act, R.S.O. 1914, ch. 193 (to which the exemptions provided for by sec. 5 of the Assessment Act are made subject, by sec. 6), are in conflict with those of sec. 10 of the Upper Canada College Act, but the latter must govern, according to the general rule that, in the absence of any indication of intention on the part of the Legislature, special Acts are not repealed by public general Acts. The general Act provides that a college or seminary of learning shall be liable to taxation for local improvements; while the Upper Canada College Act makes that institution an exception to the general rule.

The lands of Upper Canada College not being liable to assessment for local improvements (sec. 12 of the Local Improvement Act), it was not necessary that a petition for municipal by-laws relative to local improvements should be signed by the college; the college was not a person qualified and competent to sign a petition; and an action for a declaration that by-laws, based on a petition, not signed by the college, affecting lands of which the college owned more than one-half in value, were invalid, was dismissed. Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

ACTION for a declaration that three local improvement by-laws of the Corporation of the City of Toronto, the defendant, in

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respect of the widening of Oriole road and parkway, were *ultra vires* and void, upon the ground that the majority in value of the owners of property assessed for the widening work as a local improvement had not given their consent, and upon other grounds, and for an injunction restraining the defendant corporation from proceeding with the work.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Toronto.

Frank Arnoldi, K.C., and *D. D. Grierson*, for the plaintiff.

Irving S. Fairty, for the defendant corporation.

H. E. Rose, K.C., for P. W. Ellis and others, property-owners interested.

April 25. FALCONBRIDGE, C.J.K.B.:—The chief, if not the only, point in the case is, whether or not Upper Canada College is liable for assessment and taxation for local improvements.

There was much learned argument on this and the minor questions raised. I took the precaution to have this argument reported *verbatim*, and it will be sufficient for me to say that I adopt the contentions of Mr. Fairty and of Mr. Rose, who was permitted to address the Court as *amicus curiæ*.

The action will, therefore, be dismissed.

The parties are public bodies—both trustees—and each (no doubt in good faith) asserting rights which it believes from its own individual point of view to be just, and so I make no order as to costs.

I consider it reasonable, so as to start the plaintiff fairly on its way to the appellate Courts, to allow the amendment of its claim for judgment in pursuance of notice of motion in that behalf filed at the trial.

The plaintiff appealed from the judgment of FALCONBRIDGE, C.J.K.B.

June 12 and 13. The appeal was heard by GARROW, MACLAREN, and MAGEE, JJ.A., and MASTEN, J.

Frank Arnoldi, K.C., and *D. D. Grierson*, for the appellant. The city council by resolution had agreed to place the pavement

in the middle of a sixty-seven foot street (Oriole parkway) and the sidewalks and boulevards symmetrically thereto, and was bound to do so. [THE COURT, being of opinion that they could not interfere with the discretion of the council on this point, intimated that counsel for the respondents need not address himself to it.] The by-laws upon which the pavement and opening of Oriole parkway were based were not valid or enforceable as against the appellant, because it owned more than one-half in value of the lots which were assessable in support of the improvement, and the appellant had not signed the petition. Therefore sec. 12 of the Local Improvement Act, R.S.O. 1914, ch. 193, had not been complied with: *Re Township of Romney and Township of Mersea* (1885), 11 A.R. 712; *Re Robertson and Township of North Easthope* (1889), 16 A.R. 214; *Re Fenton and County of Simcoe* (1885), 10 O.R. 27. The appellant was a person qualified and competent to sign the petition for local improvements: *In re Leach and City of Toronto* (1902), 4 O.L.R. 614, at p. 621; *Bell v. Town of Burlington* (1915), 34 O.L.R. 410, 619; R.S.O. 1914, ch. 193, sec. 47; and¹ the Assessment Act, R.S.O. 1914, ch. 195, secs. 5 and 6. Although sec. 10 of the Upper Canada College Act, R.S.O. 1914, ch. 280, a special Act, exempts the college from all taxation, the later general Act repealed the earlier special Act. The imposition of local improvement rates is not taxation. The certificate of the city clerk, given in pursuance of sec. 16 of R.S.O. 1914, ch. 193, was not "final and conclusive:" *Regina v. Bridge* (1890), 24 Q.B.D. 609; "Words and Phrases Judicially Defined," vol. 3, p. 2772; *Death v. Harrison* (1870), L.R. 6 Ex. 15; *Township of McKillop v. Township of Logan* (1899), 29 S.C.R. 702.

Irving S. Fairty, for the defendant corporation, respondent, contended that the lands were exempt from taxation under R.S.O. 1914, ch. 195, sec. 5 (1). This exemption was not affected by the provisions of the Local Improvement Act or in any other way. The lands were also exempt under the Upper Canada College Act. Because of the exemption under the Assessment Act, it was unnecessary that the petition for the by-law should have been signed by the plaintiff, and so the by-laws were valid, and the judgment appealed from should be affirmed.

H. E. Rose, K.C., and *G. H. Sedgewick*, for P. W. Ellis and others, argued that under the Assessment Act the plaintiff's

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lands were exempt; and that the by-laws could not be quashed or set aside after the expiry of a year.

Arnoldi, in reply.

October 10. The judgment of the Court was delivered by MASTEN, J.:—This is an appeal by the plaintiff from the judgment of the Chief Justice of the King's Bench dated the 25th April, 1916, whereby he dismissed the plaintiff's claim without costs.

The action is to set aside three by-laws of the defendant municipality and to restrain it from proceeding with the construction of an asphalt pavement and of a sidewalk on Oriole road, in the city of Toronto, at the points and in the manner now proposed.

The plaintiff's claim is put upon two grounds. The first is, that the city council, by resolution adopted by it at the time of a conference between the governing body of the college and the city council, agreed to locate the pavement and sidewalk in question symmetrically with respect to the centre line of Oriole parkway (a sixty-seven foot roadway), and is bound by the agreement and resolution to so locate its pavement in the middle of a sixty-seven foot street, and the sidewalks and boulevards symmetrically thereto. During the course of the argument this contention was determined adversely to the appellant's contention, and the only point now remaining for decision is that next stated.

(2) The other branch of the case upon which the plaintiff founds its claim is, that the by-laws under which the pavement and sidewalk are being laid by the city are invalid and should be quashed or declared ineffective, because such by-laws can only be passed after compliance with the preliminary statutory formalities prescribed by R.S.O. 1914, ch. 193, including in particular the lodging of a petition signed by two-thirds in number and one-half in value of the property-owners liable to assessment for the proposed improvement (sec. 12). The contention of the appellant is, that it owned more than one-half in value of the lots which, if legally assessable, should be specially assessed in support of this improvement.

It therefore becomes the sole question in this action whether the plaintiff was or was not legally assessable for this local improvement, or, in other words, whether or not it was a person

qualified and competent to sign the petition for the local improvement, and so whether the petition which forms the basis for the local improvement by-law was insufficiently signed.

The petition relative to the asphalt pavement and the sidewalk appears to have been lodged in the month of June, 1914, and the local improvement by-laws based thereon to have been passed in June and July, 1914.

The opposing contentions are as follows. On the one hand, the defendant contends that the lands of the plaintiff are not liable to assessment for local improvements, being exempted by the Upper Canada College Act, R.S.O. 1914, ch. 280, sec. 10, which declares as follows: "(1) All property now vested in or which shall be hereafter in any way acquired by or vested in the College shall be exempt from taxation in the same manner and to the same extent as property vested in the Crown for the public uses of Ontario." On the other, the plaintiff contends that its lands are liable to assessment for local improvements under the Local Improvement Act, R.S.O. 1914, ch. 193, sec. 47, coupled with secs. 5 and 6 of the Assessment Act, R.S.O. 1914, ch. 195.

Section 6 of the Assessment Act provides that: "The exemptions provided for by section 5 shall be subject to the provisions of the Local Improvement Act as to the assessment for local improvements of land, which would otherwise be exempt from such assessment under that section."

Section 47 of the Local Improvement Act, R.S.O. 1914, ch. 193, provides that: "Land on which a church or place of worship is erected or which is used in connection therewith, and the land of a university, college or seminary of learning, whether vested in a trustee or otherwise, which is exempt from taxation under the Assessment Act, except schools maintained in whole or in part by a legislative grant or a school tax, shall be liable to be specially assessed."

With respect to the by-law for opening Oriole parkway, passed in 1912, on a petition filed in the same year, the statutes then in force must govern; but, while they differ in words, I do not find that they differ in effect from the consolidation contained in the Revised Statutes of 1914, which I have just quoted above. Notwithstanding the appellant's argument, I am of opinion that the collection of money for local improvements pursuant to

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R.S.O. 1914, ch. 195, is taxation. I understand it to be admitted that Upper Canada College is not a school maintained in whole or in part by a legislative grant or a school tax, and that it is a college or seminary of learning. The provisions of sec. 47, standing alone, would therefore apply to render its lands liable to assessment for local improvements.

On the other hand, the provision of sec. 10 of the Upper Canada College Act exempts it broadly from all taxation, including local improvements, if lands of the Crown are likewise so exempt. The two sections are thus in conflict, and the question is, which governs?

The general rule is that, in the absence of any indication of intention on the part of the Legislature, local Acts are not repealed by public general Acts: Craies' Statute Law, 4th ed., p. 469. This rule is illustrated and applied by Ferguson, J., in the case of *Ontario and Sault Ste. Marie R.W. Co. v. Canadian Pacific R.W. Co.* (1887), 14 O.R. 432. In that case he held that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act.

In the present case the general Act provides that a college or seminary of learning shall be liable to taxation for local improvements. The Upper Canada College Act makes that particular institution an exception to the general rule; and that, I think, is the result in the present case.

Some effort was made in argument to reach a different conclusion on the footing that the later general Act repealed the earlier special Act. I think that the rule of construction which I have quoted and applied would override this latter argument; but an examination of the provisions of the statutes in force from time to time leads me to the conclusion that, apart from the rule on which I have relied, this argument of the plaintiff is not sound.

The lands in question were conveyed to the Crown in 1889. The deed is absolute and not in trust (if that makes any difference).

At that date the matter was governed by the Assessment Act, R.S.O. 1887, ch. 193, sec. 7 (1), by which there was exempted from taxation all property vested in or held by Her Majesty.

The original enactment from which sec. 47 of R.S.O. 1914, ch. 193, is derived, was first enacted in 1890, as sec. 3 of ch. 55 of that year; but, when passed, it had no effect on the lands in question, because they were lands held not by the college, but vested in and held by Her Majesty.

So the matter remained until in 1900 the passing of the Upper Canada College Act, 63 Vict. ch. 55, vested these lands in the college.

At that date the general statutory provision corresponding to what is now sec. 47, was the Municipal Act, R.S.O. 1897, ch. 223, sec. 684, and it seems to me probable that during the years 1900-1901 and until the Act 1 Edw. VII. ch. 42 was passed, these lands were liable to taxation for local improvements; but it also seems clear to me that that Act was passed for the very purpose of removing any such liability, and that its purpose was effectively accomplished.

If, then, such an investigation has any bearing, I am unable to see that it aids the plaintiff's contention; but the investigation seems to me irrelevant, for in the present case we are governed by the two statutes which became law simultaneously on the bringing into force of the Revised Statutes of 1914.

Since, then, the lands on the west side of Oriole park are admittedly held by the plaintiff, Upper Canada College, the matter is governed by the direct provision relative to this particular college, namely, that its land shall be exempt from taxation to the same extent and in the same manner as the lands of the Crown.

By sec. 5 (1) of the Assessment Act, the interest of the Crown in any property is exempt from taxation. The inquiry resolves itself into a question whether property vested in the Crown for the public uses of Ontario is or is not liable to taxation for local improvements.

Local improvement taxes cannot be imposed on the Crown unless the statute making the imposition expressly directs that the statute is to apply to the Crown. I can find no such direction anywhere in the Local Improvement Act or elsewhere.

The result may be summarised thus:—

The levying and raising of money under the Local Improvement Act is taxation.

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Crown lands are exempt from taxation under R.S.O. 1914, ch. 195, sec. 5 (1).

This exemption is not cancelled or varied by the Local Improvement Act or otherwise. Hence Crown lands are not subject to taxation for local improvements, and neither are the lands in question.

It was not therefore necessary that the petition for the by-laws relative to these improvements should be signed by the plaintiff.

The by-laws, therefore, appear to be valid, and this action not well-founded.

This renders it unnecessary to deal with the other question argued on behalf of the plaintiff, i.e., whether the certificate of the city clerk, given in pursuance of sec. 16 of the Local Improvement Act, is final and conclusive, or whether it can now be questioned. It also renders it unnecessary to discuss the point raised by Mr. Rose, that the by-laws in question cannot be quashed after the expiry of one year.

The result is that the appeal must be dismissed.

Appeal dismissed.

END OF VOLUME XXXVII.

APPENDIX.

Ontario cases decided on appeal to the Judicial Committee of the Privy Council and Supreme Court of Canada and reported since the publication of volume 36 of the Ontario Law Reports:—

BROWN v. COLEMAN DEVELOPMENT Co., 35 O.L.R. 219, affirmed by the Supreme Court of Canada: GILLIES v. BROWN, 53 S.C.R. 557.

DUBÉ v. ALGOMA STEEL CORPORATION LIMITED, 35 O.L.R. 371, affirmed by the Supreme Court of Canada: ALGOMA STEEL CORPORATION LIMITED v. DUBÉ, 53 S.C.R. 481; reversed as to the plaintiff's claim against the other defendant: DUBÉ v. LAKE SUPERIOR PAPER Co., 53 S.C.R. 481.

McKINNON v. DORAN, 35 O.L.R. 349, affirmed by the Supreme Court of Canada: DORAN v. McKINNON, 53 S.C.R. 609.

PIONEER BANK v. CANADIAN BANK OF COMMERCE, 34 O.L.R. 531, affirmed by the Supreme Court of Canada: PIONEER BANK v. CANADIAN BANK OF COMMERCE, 53 S.C.R. 570.

ROSS AND HAMILTON GRIMSBY AND BEAMSVILLE R.W. Co., *Re*, 34 O.L.R. 599, affirmed by the Judicial Committee of the Privy Council: HAMILTON GRIMSBY AND BEAMSVILLE R.W. Co. v. ATTORNEY-GENERAL FOR ONTARIO, [1916] 2 A.C. 583.

SNELL v. BRICKLES, 28 O.L.R. 358, reversed by the Supreme Court of Canada: SNELL v. BRICKLES, 49 S.C.R. 360; restored by the Judicial Committee of the Privy Council: BRICKLES v. SNELL, [1916] 2 A.C. 599.

TORONTO, CITY OF, v. CONSUMERS GAS CO., 32 O.L.R. 21, affirmed by the Judicial Committee of the Privy Council: CITY OF TORONTO v. CONSUMERS GAS CO., [1916] 2 A.C. 618, 37 O.L.R. 586.

TORONTO R.W. CO. AND CITY OF TORONTO, *Re*, 34 O.L.R. 456, affirmed by the Judicial Committee of the Privy Council: [1916] 2 A.C. 542, 37 O.L.R. 470.

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1. *To Divisional Court of Appellate Division — Matters of Practice — Costs.*]—In matters of mere practice and pleading appeals are of no real benefit, and should not be encouraged. *Foster v. Maclean*, 68.

2. *To Divisional Court of Appellate Division — Stay of Execution of Judgment — Exception as to Injunction — Rules 496, 498 — Possession of Land—Breach of Injunction — Contempt of Court — Motion to Commit.*]—The judgment pro-

nounced at the trial directed the immediate delivery by the defendant to the plaintiffs of possession of the lands in question, and restrained the defendant from trespassing upon or in any way interfering with the plaintiffs' possession. The trial Judge directed that the defendant should be allowed to occupy the house and barns on the lands "for 15 days, or until appeal, if any, may be had." An appeal having been lodged, and the defendant continuing to occupy the house and barns, the plaintiffs moved for his committal for contempt of Court:—*Held*, that, an appeal having been lodged, the situation was governed by the Rules; and the effect of Rule 496, coupled with Rule 498, was to stay all further proceedings in the action other than the issue of the judgment and the taxation of costs. —The effect of the injunction not being stayed (Rule 496), but the plaintiffs not being in a position, by reason of the stay of other proceedings, to enforce their judgment for immediate possession, and not being in actual possession, the defendant was not guilty of a breach of the injunction. — *Semble*, that the plaintiffs' proper course would be to apply under Rule 496 to a Judge of a Divisional Court to remove the stay. *Bland v. Brown*, 534.

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—Where an order is made consequent upon the judgment disposing of the action, and it is so connected with the judgment as properly to form the subject of one and the same appeal, and its inclusion will lead to no additional inquiry or expense, an appeal from it may be entertained so that both it and the judgment may be dealt with together. In that case the security to be given on the appeal should be such as is appropriate to one appeal. *Concha v. Concha*, [1892] A.C. 670, followed. *Ottawa Separate School Trustees v. City of Ottawa*, 25.

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1. *Equalization of Assessments — Fixed Assessments of Properties in Minor Municipalities — Validation by Statute — Exemptions — Application to County Rates — Assessment Act, secs. 85-93, 233 — Jurisdiction of County Court Judge.*—By-laws having been passed by the councils of minor municipalities in the county of Welland fixing the assessments of the real property of companies at amounts less than their true values, the county council, for equalization purposes, adopted the fixed assessments, and one of the township corporations appealed from the action of the county council. All parties agreeing, the appeal was dealt with by the County Court Judge, who made the final equalization of the assessments, and ruled that, for equalization purposes, the actual value of all ratable property in each municipality, regardless of such fixed assessments, should be ascertained, and that the county rates should be levied ratably on the various municipalities in proportion to the aggregate value:—*Held*, on appeal from this ruling, that the companies whose assessments were fixed were not assessable in respect of county rates beyond the amount leviable in respect of the fixed assessments, and that for all except school rate purposes the fixed assessments must be taken as the actual value of the properties; *RIDDELL and MASTEN, JJ.*, dissenting. — Consideration of the

provisions of the Municipal Act and the Assessment Act, and especially secs. 85 to 93 and sec. 233 of the latter.—*Re Town of Sarnia and County of Lambton* (1909), 1 O.W.N. 184, approved.—*Per MEREDITH, C.J.C.P.*:—The County Court Judge had no jurisdiction to interfere with the assessments. *Re Township of Stamford and County of Welland*, 155.

2. *Local Improvements — Liability of Upper Canada College — Exemptions — Municipal By-laws — Petition — Validity — Local Improvement Act, R.S.O. 1914, ch. 193, secs. 12, 47 — Upper Canada College Act, R.S.O. 1914, ch. 280, sec. 10 — Assessment Act, R.S.O. 1914, ch. 195, secs. 5, 6 — Conflict of Statutory Provisions — Rule of Construction.*—The collection of money for local improvements pursuant to the Local Improvement Act, R.S.O. 1914, ch. 193, is "taxation," and the provisions of sec. 10 of the Upper Canada College Act, R.S.O. 1914, ch. 280, exempts the college from taxation if lands of the Crown are likewise so exempt. Crown lands are exempt from taxation under the Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (1); the exemption is not cancelled or varied by the Local Improvement Act or otherwise; and hence Crown lands are not subject to taxation for local improvements, and neither are the lands of Upper Canada College.—The provisions of sec. 47 of the Local Improvement Act, R.S.O. 1914, ch. 193 (to which the exemptions

provided for by sec. 5 of the Assessment Act are made subject, by sec. 6), are in conflict with those of sec. 10 of the Upper Canada College Act but the latter must govern, according to the general rule. *Upper Canada College v. City of Toronto*, 665.

3. *Taxation by Municipalities of Salaries of Federal Officers — Powers of Provincial Legislature — Exemptions — Assessment Act, R.S.O. 1914, ch. 195, sec. 5 (15) — Omission of Word "Imperial."*—*Held*, by MEREDITH, C.J.C.P., sitting in a Divisional Court, that the salaries of Judges or other federal officers are not exempt from provincial taxation: the Province has power to tax them, and has authorised the taxation. Section 5 (15) of the Assessment Act, R.S.O. 1914, ch. 195, considered with reference to the dropping of the word "Imperial," which was in the similar provision of the Assessment Act of 1904; and *Abbott v. City of St. John* (1908), 40 S.C.R. 597, referred to as binding authority. *City of Toronto v. Morson*, 369.

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*ditors — Claim of Mortgage-creditor to Rank on Estate—Valuing Security — Contestation of Claim by Assignee — Assignments and Preferences Act, R.S.O. 1914, ch. 134, secs. 25 (4), 27—Election of Creditor by Virtue of Proceedings in Foreclosure Action — Actual Redemption or Foreclosure not Reached — Action to Establish Claim—Terms of Relief—Costs.]—No actual redemption or foreclosure having taken place, and the plaintiff (mortgagee) proposing to forgo any right to foreclose if his claim to rank on the estate of his mortgagor in the hands of the defendant, assignee for the benefit of the mortgagor's creditors, should be established, it was held, that the fact of a foreclosure action having been begun and prosecuted was not *per se* sufficient to debar the plaintiff from bringing in the property and having his claim disposed of under sec. 25 (4) of the Assignments and Preferences Act, and he was entitled to a judgment so declaring, upon his consenting to a dismissal of the mortgage action as against the defendant.—*In re Hurst* (1871), 31 U.C.R. 116, followed. — *Held*, also, that the plaintiff should be paid his costs of this action by the defendant, but without prejudice to the amount thereof being recouped and the defendant's own costs paid out of the assets in his hands upon an administration thereof in due course.—*Grant v. West* (1896), 23 A.R. 533, 540, followed. *Barber v. Wade*, 459.*

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Securities Taken by Bank from Manufacturing Company—Bank Act, 3 & 4 Geo. V. ch. 99, sec. 88 (D.) — Insolvency of Company — Validity of Securities — Substitution or Consolidation — Goods Manufactured by Company—Goods Dealt in by Company, Manufactured by Others — Description of Goods — Sufficiency — Land Mortgages — Previous Agreement to Execute — Mortgages not Made until after Date Specified in Agreement — Intervening Insolvency.] — The defendant bank advanced money to an incorporated company, its customer, to enable it to carry on its business of manufacturing and selling goods. The company also dealt as a buyer and jobber in a certain line of goods not manufactured by it. The company having become insolvent and being in liquidation under the Winding-up Act, the liquidator and a creditor of the company brought this action for a declaration that certain securities covering goods and mortgages of land, taken by the bank from the company, were invalid. The evidence shewed that the

bank was from time to time making advances and taking securities under sec. 88 of the Bank Act, 3 & 4 Geo. V. ch. 9 (D.), on the new goods which were coming in. The goods were from time to time changing as old stock was sold and new stock brought in to replace it. A separate note and security were taken for each advance. A general security was also taken, referring to all outstanding notes, as to each of which a previous individual security had been taken:—*Held*, that this was not a substitution but rather a consolidation, and the securities so taken were valid as against the plaintiffs.—*Bank of Hamilton v. Halstead* (1897), 28 S.C.R. 235, 241, distinguished.—But *held*, that to the extent that the securities previously taken, and held by the bank at the time the winding-up petition was filed, covered goods purchased by the company from other manufacturers, they were invalid, and such goods, and the proceeds of any since sold by the bank, belonged to the liquidator for the purposes of the liquidation.—*Held*, also, that the description of the goods in the security-documents, as being all the goods in certain warehouses described, was sufficient.—*Held*, that there was nothing improper or illegal in the bank, pursuant to a previous arrangement, insisting upon and obtaining mortgages upon land from the company, and they were valid securities in the hands of the bank as against the plaintiffs. *Clarkson v. Dominion Bank*, 591.

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BILLS OF SALE AND CHATTEL MORTGAGES.

Failure to Renew Chattel Mortgage — Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 133, secs. 21, 23—Creditors of Assigns of Mortgagor — Possession Taken by Mortgagee — Sale by Mortgagee — Rights of Execution Creditors — Bill of Sale — Absence of Fraud — Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, sec. 3.—Under the plaintiffs' execution against M., the sheriff went to premises which had been occupied by M. to make a seizure of goods which had at one time been in possession of M.; the goods were claimed by R. under a bill of sale from B., whose title was under a chattel mortgage from H., who, after making the chattel mortgage, had transferred the goods to M.; B. had subsequently taken possession and sold to R., giving the bill of sale referred to. The plaintiffs impeached the chattel mortgage and bill of sale in order to enforce their execution against the goods. The chattel mortgage was made in 1911, and was then registered and the registration renewed in the following year, but not afterwards. The plaintiffs' judgment was obtained in August, 1915, and the attempt to seize was made in the same month:—*Held*, that sec. 3 of the Fraudulent Conveyances Act, R.S.O. 1914, ch. 105, had no application to the case.—*Held*, also, that the plaintiffs, not being

creditors of H., were not in a position to assert that the chattel mortgage had ceased to be valid by reason of non-compliance with sec. 21 of the Bills of Sale and Chattel Mortgage Act, R.S. O. 1914, ch. 133; and their position was not improved by a provision in the chattel mortgage enlarging the meaning of "mortgagor" and "mortgagee" so as to include the executors, administrators, and assigns of the mortgagor and mortgagee.—*Held*, also, that sec. 23 of the Act, as to taking possession, had no application to this case.—*Held*, also, that, B. having taken possession of the goods by placing a proposed purchaser in possession, before the plaintiffs had obtained judgment—the chattel mortgage being in default and there being no fraud—the subsequent sale to R. in September, 1915, was valid and the bill of sale unimpeachable by the plaintiffs. *Brown Brothers v. Modern Apartments Co. Limited*, 642.

BOARD OF RAILWAY COMMISSIONERS.

See MUNICIPAL CORPORATIONS, 1 — NUISANCE — RAILWAY, 1.

BUILDING CONDITIONS.

See VENDOR AND PURCHASER, 3.

BUILDING CONTRACT.

See CONTRACT, 1 — MECHANICS' LIENS.

BUILDINGS.

See MUNICIPAL CORPORATIONS, 3.

BY-LAWS.

See ASSESSMENT AND TAXES, 2 — COMPANY, 1 — MUNICIPAL CORPORATIONS.

CANADA TEMPERANCE ACT.

1. *Search-warrant—Information—Causes of Suspicion—Sufficiency—Question for Magistrate—Names of Persons Giving Information to Informant—Unlawfully Bringing Intoxicating Liquor into County where Act in Force—Jurisdiction of Police Magistrate—Evidence—Execution of Warrant by Informant—Offence—R.S.C. 1906, ch. 152, sec. 117 (c)—Saving Clause, sec. 117 (2)—Liquor Brought in by Accused for Himself—Acceptance of Part of Testimony of Accused—Order for Destruction of Liquor under sec. 137—Effect of Quashing Search-warrant.]—A constable swore to an information that he had just and reasonable cause to suspect and did suspect that intoxicating liquor was kept for sale, in violation of Part II. of the Canada Temperance Act, in the dwelling-house occupied by the defendant (in the county of Huron), and that the grounds of suspicion were "that the deponent is told on reliable authority that a package or box was taken into said dwelling-house last night which there is ground to believe contained intoxicating liquors:—"*Held*, following *Rex v. Bender* (1916), 36 O.L.R. 378, that the causes of suspicion must appear in the information.—The causes being set out, it was for the magistrate to decide whether there was reasonable*

cause to suspect a violation of the Act. The magistrate having issued a search-warrant upon the information, his decision should not be interfered with.—There was no reason for compelling the informant to disclose the names of *his* informants, unless the magistrate saw fit to do so.—(2) The constable executed the search-warrant, and found spirituous liquors upon the defendant's premises; the defendant was convicted of unlawfully bringing intoxicating liquor into the county:—*Held*, that the objection to the conviction that it was based upon evidence obtained by the informant in executing the search-warrant, was without force.—*Ex p. McCleave* (1900), 5 Can. Crim. Cas. 115, not followed.—*Regina v. Hefferman* (1887), 13 O.R. 616, and *Ex p. Dewar* (1909), 15 Can. Crim. Cas. 273, followed.—*Held*, also, that there was evidence upon which a conviction could be founded: bringing the liquor into the county was against the prohibition of sec. 117 (c) of the Act; and the defendant was not saved by sec. 117 (2), which does not cover the case of a person bringing into the county liquor not to any one but for himself (see the amending Act, 7 & 8 Edw. VII. ch. 71, sec. 1).—Moreover, the magistrate was not bound, believing part of the defendant's evidence, to believe the remainder.—*Rex v. Van Norman* (1909), 19 O.L.R. 447, followed.—(3) An order for the destruction of the liquor naturally and properly followed the conviction: sec. 137.—A motion to

quash the search-warrant, conviction, and order was refused.—*Semble*, if the search-warrant had been quashed, the conviction and order would not be affected. *Rex v. Swarts*, 103.

2. *Search-warrant — Information — Grounds for Suspicion — Keeping Intoxicating Liquor for Sale — Evidence — Conviction — Police Magistrate — Jurisdiction.*—In a county where the Canada Temperance Act was in force, a search-warrant was issued by a Police Magistrate upon an information which stated, in regard to the defendant's hotel, "that the deponent knows that intoxicating liquor is being brought to the said hotel and persons are resorting there, as the deponent has good reason to believe, for the purpose of drinking the same:—"*Held*, that the magistrate might well consider that there were reasonable grounds of suspicion; and the search-warrant should not be quashed.—The Inspector laid an information against the defendant for unlawfully keeping intoxicating liquor for sale, contrary to the Act, and the defendant was convicted by the Police Magistrate:—*Held*, that there was evidence to support the conviction, and it should not be quashed.—Nature of evidence indicated. *Rex v. Bedford*, 108.

See CONSTITUTIONAL LAW.

CASES.

Abbott v. City of St. John (1908), 40 S.C.R. 597, referred

to.] — See ASSESSMENT AND TAXES, 3.

Agar-Ellis, In re (1883), 24 Ch.D. 317, 326, specially referred to.]—See INFANTS, 1.

Allen Manufacturing Co. v. Murphy (1911), 23 O.L.R. 467, specially referred to.]—See COVENANT.

Arnold v. Cook, Re (1916), 36 O.L.R. 504, affirmed.]—See DIVISION COURTS.

Arthur Roman Catholic Separate School Trustees v. Township of Arthur (1891), 21 O.R. 60, approved.]—See SCHOOLS.

Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348, followed.] — See CONSTITUTIONAL LAW.

Bank of Hamilton v. Halstead (1897), 28 S.C.R. 235, 241, distinguished.] — See BANKS AND BANKING.

Bank of New Zealand v. Simpson, [1900] A.C. 182, 187, followed.] — See VENDOR AND PURCHASER, 1.

Bank of Ottawa v. Christie (1916), 37 O.L.R. 330, affirmed.] — See PROMISSORY NOTE.

Bartlett v. Bartlett Mines Limited (1911), 24 O.L.R. 419, followed.]—See COMPANY, 1.

Barwick v. English Joint Stock Bank (1867), L.R. 2 Ex. 259, followed.] — See FRAUD AND MISREPRESENTATION.

Bateman v. County of Middlesex (1911-12), 24 O.L.R. 84, 87, 25 O.L.R. 137, 27 O.L.R. 122, referred to.] — See DAMAGES.

Bellairs v. Bellairs (1874), L.R. 18 Eq. 510, 516, followed.] — See WILL, 3.

Boulton v. Church Society of the Diocese of Toronto (1868), 15 Gr. 450, followed.]—See COURTS.

Bryce Brothers v. Kinnee (1892), 14 P.R. 509, 510, 511, followed.] — See INTERPLEADER.

Burrows v. Lang, [1901] 2 Ch. 502, specially referred to.] — See WATER, 1.

Canadian Northern R.W. Co. v. Robinson, [1911] A.C. 739, distinguished.]—See RAILWAY, 1.

Chartered Mercantile Bank of India London and China v. Dickson (1871), L.R. 3 P.C. 574, distinguished.]—See PROMISSORY NOTE.

Chesterfield's (Earl of) Trusts, In re (1883), 24 Ch.D. 643, applied.]—See WILL, 5.

Concha v. Concha, [1892] A.C. 670, followed.]—See APPEAL, 3.

Constable v. Bull (1849), 3 DeG. & S. 411, specially referred to.]—See WILL, 3.

Contract Corporation, Re, Hakin's Case (1871), 25 L.T.R. 552, followed.] — See COMPANY, 4.

Crowe v. Adams (1892), 21 S.C.R. 342, 344, dictum in, dissented from.] — See INTERPLEADER.

Cushen v. City of Hamilton (1902), 4 O.L.R. 265, followed.] — See MISTAKE.

Davidson's Trustees v. Ogilvie, [1910] Sess. Cas. 294, not followed.] — See WILL, 5.

Dewar, Ex p. (1909), 15 Can. Crim. Cas. 273, followed.]—See CANADA TEMPERANCE ACT, 1.

Didisheim v. London and Westminster Bank, [1900] 2 Ch. 15, followed.]—See INFANTS, 2.

Dimes v. Grand Junction Canal Co. (1852), 3 H.L.C. 759, followed.]—See COURTS.

Duddy v. Gresham (1878), 2 L.R. Ir. 442, 465, followed.]—*See WILL*, 3.

Durrant v. Ecclesiastical Commissioners (1880), 6 Q.B.D. 234, distinguished.]—*See MISTAKE*.

Edmonton Street R.W. Co. v. Grand Trunk Pacific R.W. Co. (1912), 7 D.L.R. 888, referred to.]—*See RAILWAY*, 1.

Elmsley v. Madden (1871), 18 Gr. 386, followed.]—*See WILL*, 4.

Everly v. Dunkley (1912), 27 O.L.R. 414, applied and followed.]—*See GIFT*.

Farley v. Pedlar (1901), 1 O.L.R. 570, followed.]—*See INTERPLEADER*.

Flegg v. Prentis, [1892] 2 Ch. 428, followed.]—*See EXECUTION*.

Fletcher v. Rodgers (1878), 27 W.R. 97, followed.]—*See INFANTS*, 2.

Forbes v. Grimsby Public School Board (1903), 6 O.L.R. 539, approved and applied.]—*See SCHOOLS*.

Ford v. Foster (1872), L.R. 7 Ch. 611, referred to.]—*See TRADE MARK*.

Goldsworthy, In re (1876), 2 Q.B.D. 75, 84, specially referred to.]—*See INFANTS*, 1.

Grand Trunk R.W. Co. v. United Counties R.W. Co. (1908), 7 Can. Ry. Cas. 294, distinguished.]—*See RAILWAY*, 1.

Grant v. West (1896), 23 A.R. 533, 540, followed.]—*See ASSIGNMENTS AND PREFERENCES*.

Guelph and Goderich R.W. Co. v. Guelph Radial R.W. Co. (1906), 5 Can. Ry. Cas. 180, distinguished.]—*See RAILWAY*, 1.

Hall-Dare, In re, [1916] 1 Ch. 272, followed.]—*See WILL*, 4.

Hanrahan v. Hanrahan (1890), 19 O.R. 396, applied.]—*See INFANTS*, 2.

Heath v. Chapman (1854), 2 Drew. 254, followed.]—*See WILL*, 4.

Hodge v. The Queen (1883), 9 App. Cas. 117, followed.]—*See CONSTITUTIONAL LAW*.

Hogaboom v. Grundy (1894), 16 P.R. 47, followed.]—*See INTERPLEADER*.

Holmes v. Millage, [1893] 1 Q.B. 551, followed.]—*See EXECUTION*.

Huntington v. Attrill, [1893] A.C. 150, followed.]—*See JUDGMENT*, 1.

Hurst, In re (1871), 31 U.C.R. 116, followed.]—*See ASSIGNMENTS AND PREFERENCES*.

Jamal v. Moolla Dawood Sons & Co., [1916] A.C. 175, followed.]—*See DAMAGES*.

Johnson, Re (1912), 27 O.L.R. 472, followed.]—*See WILL*, 3.

Lavere v. Smith's Falls Public Hospital (1915), 35 O.L.R. 98, 115, referred to.]—*See DAMAGES*.

Lloyd, Re (1914), 31 O.L.R. 476, explained.]—*See INFANTS*, 2.

Lloyd v. Lloyd (1852), 2 Sim. N.S. 255, 263, followed.]—*See WILL*, 3.

Lloyd v. Robertson (1916), 35 O.L.R. 264, reversed.]—*See WILL*, 1.

Lowery and Goring v. Booth (1915), 34 O.L.R. 204, reversed.]—*See WATER*, 2.

McArthur v. Dominion Cartridge Co., [1905] A.C. 72, distinguished.]—*See NEGLIGENCE*.

McCleave, Ex p. (1900), 5 Can. Crim. Cas. 115, not followed.]—*See CANADA TEMPERANCE ACT*, 1.

McDonald v. Murray (1883-85), 2 O.R. 573, 11 A.R. 101, followed.] — See VENDOR AND PURCHASER, 1.

McGrath, In re, [1893] 1 Ch. 143, 148, specially referred to.] — See INFANTS, 1.

McLeod v. McNab, [1891] A.C. 471, 476, referred to.] — See WILL, 2.

Mason v. Provident Clothing and Supply Co., [1913] A.C. 724 specially referred to.] — See COVENANT.

May, In the Goods of (1868), 1 P. & D. 581, referred to.] — See WILL, 2.

Merchants Bank of Canada v. Whitfield (1881), 2 Dorion (Que.) 157, approved.] — See PROMISSORY NOTE.

Mitchell v. Fidelity and Casualty Co. of New York (1915), 35 O.L.R. 280, affirmed.] — See INSURANCE, 1.

Morris (Herbert) Limited v. Saxelby, [1916] 1 A.C. 688, specially referred to.] — See COVENANT.

Morrow v. Lancashire Insurance Co. (1898-9), 29 O.R. 377, 26 A.R. 173, referred to.] — See INSURANCE, 3.

National Starch and Manufacturing Co. v. Munn's Patent Maizena and Starch Co., [1894] A.C. 275, referred to.] — See TRADE MARK.

Newman (George) & Co., In re, [1895] 1 Ch. 674, followed.] — See COMPANY, 1.

Norris, Re, and Re Drope (1902), 5 O.L.R. 99, 101, followed.] — See LUNATIC, 1.

O'Hanlon v. Logue, [1906] 1 I.R. 247, not followed.] — See WILL, 4.

Ontario Express and Transportation Co., In re (1894), 25 O.R. 587, overruled.] — See COMPANY, 1.

Ozd v. Coombes (1884), 28 Sol. J. 378, followed.] — See VENDOR AND PURCHASER, 1.

Park v. Phoenix Insurance Co. (1859), 19 U.C.R. 110, followed.] — See INSURANCE, 3.

Parke v. Riley (1866), 3 E. & A. 215, explained.] — See VENDOR AND PURCHASER, 3.

Parsons v. Citizens' Insurance Co. (1878), 43 U.C.R. 261, followed.] — See INSURANCE, 3.

Pearson (S.) & Son Limited v. Dublin Corporation, [1907] A.C. 351, 358, followed.] — See FRAUD AND MISREPRESENTATION.

Philson v. Stevenson (1903), 37 Ir. L.T.R. 104, 225, specially referred to.] — See WILL, 3.

Prevost v. Bedard (1915), 51 S.C.R. 629, specially referred to.] — See JUDGMENT, 2.

Publishers' Syndicate, Re, Paton's Case (1903), 5 O.L.R. 392, 406, followed.] — See COMPANY, 1.

Raulin v. Fischer, [1911] 2 K.B. 93, followed.] — See JUDGMENT, 1.

Regina v. Heffernan (1887), 13 O.R. 616, followed.] — See CANADA TEMPERANCE ACT, 1.

Rex v. Bender (1916), 36 O.L.R. 378, followed.] — See CANADA TEMPERANCE ACT, 1.

Rex v. Canadian Pacific R.W. Co. (1915), 33 O.L.R. 248, followed.] — See MUNICIPAL CORPORATIONS, 1.

Rex v. Dubuc (1914), 22 Can. Crim. Cas. 426, approved.] — See CRIMINAL LAW, 1.

Rex v. Hayes (1903), 5 O.L.R. 198, 6 Can. Crim. Cas. 357, distinguished.] — See CRIMINAL LAW, 2.

Rex v. Hung Gee (1913), 21 Can. Crim. Cas. 404, distinguished.]—See CRIMINAL LAW, 1.

Rex v. Jung Lee (1913), 22 Can. Crim. Cas. 63, distinguished.]—See CRIMINAL LAW, 1.

Rex v. Van Norman (1909), 19 O.L.R. 447, followed.] — See CANADA TEMPERANCE ACT, 1.

Reynolds v. Foster (1912-13), 23 O.W.R. 613, 933, 4 O.W.N. 448, 694, not followed.] — See VENDOR AND PURCHASER, 1.

Rice v. Provincial Insurance Co. (1858), 7 U.C.C.P. 548, followed.] — See INSURANCE, 3.

Robertson v. Robertson (1908), 16 O.L.R. 170, approved.]—See JUDGMENT, 1.

Rourke, Re (1915), 33 O.L.R. 519, followed. — See LUNATIC, 1.

Ryan, Re (1900), 32 O.R. 224, applied and followed.]—See GIFT.

Sarnia, Town of, and County of Lambton, Re (1909), 1 O.W.N. 184, approved.] — See ASSESSMENT AND TAXES, 1.

Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287, specially referred to.]—See NUISANCE.

Skeans v. Hampton (1914), 31 O.L.R. 424, distinguished.]—See COVENANT.

Smith v. Fort William School Board (1893), 24 O.R. 366, approved and applied.] — See SCHOOLS.

Staples, In re, [1916] 1 Ch. 322, followed.]—See WILL, 4.

Swaizie v. Swaizie (1899), 31 O.R. 324, approved.] — See JUDGMENT, 1.

Thiery v. Chalmers Guthrie & Co., [1900] 1 Ch. 80, followed.] — See INFANTS, 2.

Thomson's Estate, In re (1880), 14 Ch.D. 263, followed.]—See WILL, 3.

Toronto, City of, v. Consumers Gas Co. (1914), 32 O.L.R. 21, affirmed.] — See MUNICIPAL CORPORATIONS, 2.

Toronto, City of, v. Toronto R.W. Co. (1905), 5 O.W.R. 130, approved.] — See STREET RAILWAY, 1.

Toronto R.W. Co. and City of Toronto, Re (1915), 34 O.L.R. 456, affirmed.] — See STREET RAILWAY, 1.

Toronto R.W. Co. v. Toronto Corporation, [1906] A.C. 117, distinguished.] — See STREET RAILWAY, 1.

Towers v. African Tug Co., [1904] 1 Ch. 558, followed.]—See COMPANY, 1.

Tuck, In re (1905), 10 O.L.R. 309, followed.]—See WILL, 3.

United Mining and Finance Corporation Limited v. Becher, [1910] 2 K.B. 296, [1911] 1 K.B. 840, specially referred to.]—See SOLICITOR.

Walker, In re, [1905] 1 Ch. 160, followed.] — See LUNATIC, 2.

West v. Shuttleworth (1835), 2 My. & K. 684, followed.]—See WILL, 4.

Western Bank of Scotland v. Addie (1867), L.R. 1 H.L. Sc. 145, 166, 167, dictum in, not approved.] — See FRAUD AND MISREPRESENTATION.

Wheeldon v. Burrows (1879), 12 Ch. D. 31, specially referred to.] — See WATER, 1.

Willoughby v. Canadian Order of Foresters (1916), 36 O.L.R.

507, affirmed.] — See INSURANCE, 4.

Wilson, In the Goods of (1868), 1 P.D. 582, referred to.]—See WILL, 2.

CHARGE ON LAND.

Will — Interest of Infant Devisee — Commutation of Benefits of Widow of Testator Charged on Land — Sanction of Court to Mortgage.] — Certain personal rights given to his widow by the will of a testator were, by agreement among those interested in the estate, commuted to a block payment; and the sanction of the Court was given, in the interest of the infant devisee, to the raising of the sum agreed upon by mortgage on the land devised to him in fee. *Weese v. Weese*, 649.

See LAND TITLES ACT—MORTGAGE.

CHARGING ORDER.

See EXECUTION.

CHARITABLE USE.

See WILL, 4.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHILDREN'S AID SOCIETY.

See INFANTS, 1.

CHURCH.

See WILL, 4.

CODICILS.

See WILL, 2.

COLLATERAL SECURITY.

See PROMISSORY NOTE.

COMMISSION.

See COMPANY, 1, 3.

COMMITTEE.

See LUNATIC, 1, 2.

COMMON GAMING HOUSE.

See CRIMINAL LAW, 1.

COMPANY.

1. *Directors — Payment of Dividend Partly out of Capital — Ultra Vires — Ratification by Shareholders—Liability to Refund —Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 15—Status as Plaintiff of Shareholder who Received and Retained Dividend — Sec. 95 of Act — Counterclaim of Company — Commission Paid to Director — Sec. 92 of Act—Sums Paid to Promoters by Vendor-promoter before Incorporation of Company—Breach of Trust—Parties —By-laws and Resolutions of Directors—Confirmation by Shareholders — Ineffectiveness.*]—In an action by a shareholder of a company against the company and directors, it was held, in the circumstances set out in the report:—(1) That a dividend paid to the shareholders was in part paid out of capital, and that the payment was *ultra vires* of the directors and incapable of ratification by the shareholders, although (*semble*) the object of the payment might have been effected under sec. 15 of the Companies Act or by way of voluntary winding-up; but the plaintiff, having with knowledge

received and retained his share of the dividend, was incompetent to maintain the action, and was in no stronger position because he represented himself as suing on behalf of others as well as himself. *Towers v. African Tug Co.*, [1904] 1 Ch. 558, followed, and sec. 95 of the Act referred to. The company was entitled to judgment on its counterclaim for the return of so much of the dividend paid to the plaintiff as involved an impairment of capital.—(2) That the payment by the directors of a commission to one of them for his services in selling land which the company had acquired with the object of selling was invalid (sec. 92 of the Act); D. was ordered to repay, and the directors who sanctioned the payment were also made liable. *Bartlett v. Bartlett Mines Limited* (1911), 24 O.L.R. 419, followed, and *In re Ontario Express and Transportation Co.* (1894), 25 O.R. 587, taken as overruled.—(3) That sums paid to the defendants F. and D. for their services as promoters, by W., also a promoter and the vendor to the company, out of the profit which he made on the sale, should be paid over to the company by F. and D., who were in a fiduciary position and committed a breach of trust; and resolutions of the shareholders were ineffective to ratify these payments. *In re George Newman & Co.*, [1895] 1 Ch. 674, and *Re Publishers' Syndicate, Paton's Case* (1903), 5 O.L.R. 392, 406, followed. The attempt to ratify the payments did not make the

other directors liable for them.—

(4) That the plaintiff was competent to maintain the action (except as above), making the company a defendant and suing in respect of an act beyond its powers, which a majority of the shareholders were unable to affirm. *Crawford v. Bathurst Land and Development Co. Limited*, 611.

2. *Powers — Contract — Guaranty — "Advances" — Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 23 (1) (k)—Amending Act, 6 Geo. V. ch. 35, sec. 6—Extension of Corporate Powers.*—The plaintiff sued upon a contract by which the defendant company guaranteed payment for work done by him in erecting a factory upon the company's land. The work was begun under an earlier contract between the plaintiff and one T., who had an "option" for the purchase of the land from the company, and who appeared to be in reality only the agent of the company, to whose advantage it was to have the factory erected in order to improve their chances of selling other lands in the same tract:—*Held*, that the company were liable to the plaintiff either as the real contractors with the plaintiff or as guarantors; and, assuming that the contract was strictly one of guaranty, it was not *ultra vires* of the company, a corporation created under the Ontario Companies Act, R.S.O. 1914, ch. 178; T. was a person having dealings with the company, and the company had power to guarantee the perform-

ance of his contract with the plaintiff in respect of the factory: sec. 23, sub-sec. 1 (k).—"Advances" made by the company (as recited in the contract) were either loans to T. or payments to the plaintiff.—Meaning of "advances."—The last amendment of the Companies Act, by 6 Geo. V. ch. 35, sec. 6, adding sec. 210, appears to confer complete corporate autonomy on statutory incorporated companies and to put them on the footing of Crown-chartered companies with unrestricted corporate capacity. *Diebel v. Stratford Improvement Co.*, 492.

3. *Winding-up — Creditor's Claim — Special Privilege over Ordinary Creditors — "Clerk or Other Person" — "Arrears of Salary or Wages" — Winding-up Act, R.S.C. 1906, ch. 144, sec. 70 — Sales-agent — Contract — Commissions.*—A person with whom an incorporated trading company had entered into an agreement under which he was to act as their agent for the sale of their goods in a certain territory, and who had done work for them under the agreement, was held, in respect of commissions which he claimed under the agreement, not to be a "clerk or other person" entitled, in the winding-up of the company under the Winding-up Act, R.S.C. 1906, ch. 144, to "be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages," within the meaning of sec. 70 of the Act. *Re Parkin Elevator*

Co. Limited, Dunsmoor's Claim, 277.

4. *Winding-up — Transfer of Company's Land — Misfeasance of Directors—Order for Production of Books and Documents of Transferee-company — Jurisdiction — Winding-up Act, R.S.C. 1906, ch. 144, secs. 108, 117, 119 — Rule 350 — "Person" — "Action" — Examination of Person — Basis of Subsequent Proceedings.*—In the course of a reference for the winding-up of an insolvent company, it appeared that the company's land had been transferred to another company, and a large profit had been made. Misfeasance of the directors was charged, and, at the instance of the liquidator, an order was made for the production and inspection of all books and documents in the possession or control of the transferee-company:—Held, that sec. 108 of the Winding-up Act, R.S.C. 1906, ch. 144, practically incorporated Rule 350 of the Rules of the Supreme Court of Ontario, and that Rule and secs. 117 and 119 of the Act conferred jurisdiction and warranted the making of the order.—Scope and meaning of "person" as used in secs. 117 and 119 (having regard to the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (20)), and of "action" in Rule 350.—A person against whom no proceedings are pending is bound to go before the examiner, though he may conceive that the examination is required for the purpose of afterwards proceeding against him.—*Re Contract Corporation, Hakin's*

Case (1871), 25 L.T.R. 552, followed. *Re Toronto Rowing Club*, 23.

See BANKS AND BANKING — EXECUTION — FRAUD AND MISREPRESENTATION—WILL, 5.

COMPENSATION.

See HIGHWAY — MUNICIPAL CORPORATIONS, 2, 3.

CONSPIRACY.

See LIBEL.

CONSTABLE.

See NEW TRIAL.

CONSTITUTIONAL LAW.

Liquor License Act, R.S.O. 1914, ch. 215, sec. 141—Amendments by 4 Geo. V. ch. 37, sec. 5, and 5 Geo. V. ch. 39, sec. 33—Intra Vires — “Municipality in which no Tavern or Shop License is Issued” — Municipality where Canada Temperance Act in Force — Application of sec. 141 — Attempted Confinement to Local Option Municipalities — Effect of Headings in Statutes—3 & 4 Geo. V. ch. 2 (O.)—Section 141 of the Liquor License Act, R.S.O. 1914, ch. 215 (as amended by 4 Geo. V. ch. 37, sec. 5, and 5 Geo. V. ch. 39, sec. 33), declaring that a person found drunk in a public place in a municipality in which a local option by-law is in force or in which no tavern or shop license is issued is guilty of an offence, is *intra vires* of the Ontario Legislature. —*Hodge v. The Queen* (1883), 9 App. Cas. 117, and *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896]

A.C. 348, followed.—The section is applicable to the case of a person found in such a condition in a municipality where Part II. of the Canada Temperance Act is in force.—Section 141 is grouped in R.S.O. 1914, ch. 215, with the sections immediately preceding and following it, under the heading “Local Option;” but the heading forms no part of the statute: Act respecting the Revision and Consolidation of the Statutes of Ontario, 3 & 4 Geo. V. ch. 2. *Re Rex v. Scott*, 453.

See ASSESSMENT AND TAXES, 3.

CONTEMPT OF COURT.

See APPEAL, 2.

CONTRACT.

1. *Building Contract — Alterations in Building — Work not Finished because of Subsidence — Fault of Contractor — Absence of Intervention by Owner — New Work Done by Contractor — Liability of Owner — Work Done to Arrest Further Subsidence — Deduction of Sum for Damages.*—Where the plaintiff contracted to excavate a cellar and build a retaining wall, and the contract in respect of the retaining wall became impossible of performance, both because of subsidence and the interference of the municipal building inspector, and substituted work was directed by the defendant, the owner:—*Held*, that, as the retaining wall could have been built before the cellar was excavated, and any risk thus avoided, the plaintiff was responsible for the method actually

adopted, it not having been shewn that the defendant actively intervened to direct or superintend.—And *held*, that the direction to do the substituted work was, in the circumstances, sufficient to make the defendant liable for its cost, but not for the expense of arresting further subsidence.—*Held*, also, that the defendant was entitled for damages to a sum which should be deducted from the cost. *Galbreath v. Crich*, 424.

2. *Permission to Draw Water from Neighbouring Land—Construction of Written Agreement—Easement—Lease—Right in Gross—Personal License not Binding Land—Registry Act—Notice—Agreement between Strangers to Title.*—The owner of a farm (lot 14) having a spring upon it, by an oral agreement, made in 1903 or 1904, with F. N., the son of the owner of the adjoining farm (lot 13), permitted him to put in an hydraulic ram at the spring and to convey water from the spring to lot 13. The ram was put in and was used from 1903 until September, 1911, when the husband of the owner of lot 14 signed a written memorandum as follows: "The undersigned agrees to lease hydraulic water privilege on part of lot 14 . . . for 49 years, to F. N. . . and also privilege of making any repairs on said privilege without damage to crop and also that undersigned to have privilege of using waste water to be taken by him to his property." The use of the ram was continued. F. N.'s father

died in 1912, and F. N. became the owner of lot 13; in 1915, he made an agreement for the sale of it to P., who took possession. In April, 1915, the owner conveyed lot 14 to the defendant, who prevented P. from using the ram and the water:—*Held*, that the agreement was a personal license, which did not bind the land nor the defendant.—*Per MEREDITH, C.J.C.P., and MASTEN, J.*—The agreement was not to be construed as a lease or an easement; and, if a right in gross only, would not be assignable.—*Per MEREDITH, C.J.C.P.*—The title to lot 14 was a registered title, and the defendant, being the duly registered owner, was entitled to the protection which the Registry Act affords, except in so far as he had actual notice of any adverse rights. *Naegle v. Oke*, 61.

See COMPANY, 2, 3 — COVENANT — EVIDENCE — INSURANCE — MASTER AND SERVANT, 1 — MECHANICS'. LIENS — STREET RAILWAY, 1 — VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE.

See RAILWAY, 2.

CONVICTION.

See CANADA TEMPERANCE ACT — CRIMINAL LAW — MUNICIPAL CORPORATIONS, 1.

COSTS.

See APPEAL, 1—ASSIGNMENTS AND PREFERENCES—DAMAGES—DIVISION COURTS—INFANTS, 1—LIBEL—MORTGAGE—VENDOR

AND PURCHASER, 3—WATER, 2
—WILL, 1, 4.

COUNTERCLAIM.

See COMPANY, 1.

COUNTY COURT JUDGE.

See ASSESSMENT AND TAXES, 1
—COURTS.

COUNTY COURTS.

See COURTS.

COURTS.

Jurisdiction — Judicature Act, R.S.O. 1914, ch. 56, secs. 32 (2), (3), 119 — County Court Action — Power of County Court Judge to Refer Case to Divisional Court of Appellate Division — “Prior Known Decision” — “Judge of Co-ordinate Authority” — Decision of County Court Judge in Division Court — Disqualification of Judges — Pecuniary Interest — Qualification ex Necessitate.—A motion for judgment, in an action brought in a County Court, was referred by the Judge of the County Court, under secs. 32 and 119 of the Judicature Act, R.S.O. 1914, ch. 56, to a Divisional Court of the Appellate Division of the Supreme Court of Ontario, because the County Court Judge felt that he could not depart from a “prior known decision” (sec. 32 (2)) of another County Court Judge, in an action in a Division Court, between the same parties, and upon the same subject-matter, which he deemed to be wrong and of sufficient importance to be considered in a higher Court (sec. 32 (3)):*—Held (MEREDITH, C.J. C.P., dissenting), that the County*

Court Judge presiding in the Division Court was not a “Judge of co-ordinate authority” (sec. 32 (2)) with the Judge of the County Court sitting in the County Court; and, therefore, there was no power to refer the motion, and the Divisional Court should dismiss it.—*Seemle*, that, though all the Judges appointed and paid by the Dominion Government were disqualified by personal pecuniary interest from hearing this case, they became qualified *ex necessitate*, as in *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, and *Boulton v. Church Society of the Diocese of Toronto* (1868), 15 Gr. 450. *City of Toronto v. Morson*, 369.

See APPEAL — DIVISION
COURTS — SURROGATE COURTS.

COVENANT.

Restraint of Trade — Master and Servant — Unreasonable Restrictions — Public Interests — Protection of Master — Inseparable Provisions — Refusal to Enforce Contract.—The defendant was employed by the plaintiffs as a salesman of their cakes and pastry, with which he was supplied at wholesale prices and which he sold at retail, the profit or loss being his. A restricted locality in a city was allotted to him. He covenanted with the plaintiffs that he would not during his employment, or within twelve months after its termination, drive a cake-waggon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery

products, within the city of Toronto, for himself or for any other person, firm, or company than the plaintiffs:—*Held*, that the covenant, while reasonable as to time, was too wide as to locality and in other respects, and therefore unreasonable and unenforceable, because contrary to public interests and unnecessary for the plaintiffs' protection; that the reasonable and unreasonable parts of the contract were not separable; and that there was a sufficient consideration for the restraint contracted for, in the employment of the defendant by the plaintiffs.—*Semble*, that the contract was obtained in such circumstances that it ought not to be enforced.—*Skeans v. Hampton* (1914), 31 O.L.R. 424, distinguished. — *Allen Manufacturing Co. v. Murphy* (1911), 23 O.L.R. 467, *Herbert Morris Limited v. Saxelby*, [1916] 1 A.C. 688, and *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724, specially referred to. *George Weston Limited v. Baird*, 514.

CREDITORS.

See *BILLS OF SALE AND CHATEL MORTGAGES — COMPANY*, 3.

CRIMINAL LAW.

1. *Keeping Disorderly House — Common Gaming-house — Police Magistrate's Conviction — Imprisonment — Appeal to Sessions — Order for Bail — Failure of Prisoners to Enter into Recognizances — Habeas Corpus — Right of Appeal — Motion to Quash Conviction — Evidence — Club-house Kept for Gain — "Keepers"*

— *Persons Assisting in Care and Management — Criminal Code*, secs. 226, 228, 749, 750, 797 (amended by 3 & 4 Geo. V. ch. 13, sec. 28).]—The defendants were convicted by the Police Magistrate for a city, under sec. 773 (f) of the Criminal Code, for keeping a disorderly house, and were sentenced to 30 days' imprisonment. On their behalf an appeal was lodged to the Sessions, under sec. 749 of the Code; and an order was made by a Judge that, upon the defendants entering into recognizances (of which he approved), they should be released from gaol:—*Held*, that, although the bondsmen had signed the bail-bonds, and although the defendants were ready and willing to enter into the recognizances, they had not in fact done so—assuming that sec. 750 (c) of the Code was applicable; and were not entitled to be discharged upon *habeas corpus*.—*Held*, also, that an appeal from the conviction to the Sessions did not lie: the change in the Criminal Code, R.S.C. 1906, ch. 146, sec. 797, by 3 & 4 Geo. V. ch. 13, sec. 28, takes away the right of appeal which was given by sec. 797, and limits it to the special case of two Justices of the Peace.—*Rex v. Dubuc* (1914), 22 Can. Crim. Cas. 426, approved.—*Held*, also, upon the evidence, that the place in respect of which the conviction was made—a club-house where "poker" was played for money—was a house kept by the club for gain (sec. 226 of the Code); it was, therefore, a disorderly house (sec. 228), and the keeper was

guilty of an indictable offence.—Although the defendants were not the real owners, and might not be the real keepers, they assisted in the care and management, and must be considered the real keepers (sec. 228 (2)).—*Rex v. Jung Lee* (1913), 22 Can. Crim. Cas. 63, and *Rex v. Hung Gee* (1913), 21 Can. Crim. Cas. 404, distinguished. *Rex v. Merker and Daniels*, 582.

2. Keeping "House of Ill-fame" — Magistrate's Conviction — Jurisdiction — Criminal Code, R.S.C. 1906, ch. 146, sec. 774—Amendment by 8 & 9 Edw. VII. ch. 9 — "Disorderly House" — Power to Amend Conviction — Criminal Code, secs. 791, 852, 1124.]—Section 774 of the Criminal Code, R.S.C. 1906, ch. 146, gave absolute jurisdiction to a magistrate in case of a person charged with keeping a disorderly house, house of ill-fame, or bawdy-house. By a statute of 1909, 8 & 9 Edw. VII. ch. 9, sec. 774 was amended, and the jurisdiction was declared to be as to one charged with keeping a disorderly house or being an inmate of a common bawdy-house—"house of ill-fame" being dropped. A magistrate's conviction in 1916, ignoring the change in the statute, was for that the defendant "did keep a certain house of ill-fame." The evidence amply supported the charge that the place in question was kept and used by the defendant for purposes of prostitution:—*Held*, that the conviction was in substance good, and the form should be amended

by describing the offence as "keeping a disorderly house, to wit, a house of ill-fame:" secs. 791, 852, and 1124 of the Code.—*Rex v. Hayes* (1903), 5 O.L.R. 198, 6 Can. Crim. Cas. 357, distinguished. *Rex v. Darroch*, 27.

3. Murder — Evidence — Depositions of Witnesses at Coroner's Inquest and Preliminary Investigation — Witnesses Called by Crown at Trial — Contradiction of Former Statements — Cross-examination by Crown Counsel of Witnesses as Adverse — Admissibility of Depositions Confined to Purpose of Discrediting Witness —Canada Evidence Act, secs. 9, 10, 11 — Judge's Charge — Absence of Objection at Trial — Stated Case — Misdirection — Effect of — "Substantial Wrong or Miscarriage"—Criminal Code, sec. 1019 — New Trial.]—The prisoner, who admittedly shot and killed his brother-in-law, was tried on a charge of murder. The plea was that the shooting was accidental or done in self-defence. Three Crown witnesses who, at the coroner's inquest and at the preliminary investigation before a magistrate, had testified to facts which made against the defence, at the trial mainly contradicted their former testimony, and gave unsatisfactory evidence tending to exculpate the prisoner. Counsel for the Crown, treating them as adverse, cross-examined them, and read to them portions of their depositions before the coroner and magistrate, which they mainly either contradicted or did not altogether admit to be true. The depositions were put

in, and in his charge to the jury the trial Judge referred to them. No objection to the charge was made by counsel for the prisoner before the verdict, which was "guilty," but, after the verdict and sentence, upon the application of counsel for the prisoner, a case was stated by the trial Judge for the opinion of the Court, the question submitted being, "Was there in my charge to the jury either misdirection or nondirection in respect to the use made at the trial of the evidence of these three witnesses, or any of them, given at the inquest, or at the preliminary investigation?" — *Held*, by CLUTE, RIDDELL, and MASTEN, JJ. (MEREDITH, C.J.C.P., and LENNOX, J., dissenting in the result), that the depositions taken on the former occasions were not before the jury as evidence of the facts, but must be confined in their effect to the discrediting of the witnesses who had proved adverse; that the fact that no objection to the charge was made at the trial was not a fatal obstacle to the success of an objection made later; that the trial Judge misdirected the jury by giving them to understand that, in determining the facts, they might consider what the witnesses had sworn previously; that the question asked should be answered in the affirmative; and, notwithstanding that there was other evidence upon which the jury could properly have based a verdict of "guilty," that there should be a new trial, "some substantial wrong or miscarriage" (Criminal Code, R.S.

C. 1906, ch. 146, sec. 1019) having been occasioned on the trial. — Sections 9, 10, and 11 of the Canada Evidence Act, R.S.C. 1906, ch. 145, considered. *Rex v. Duckworth*, 197.

See CANADA TEMPERANCE ACT
— MUNICIPAL CORPORATIONS, 1.

CUSTODY.

See INFANTS, 1.

DAMAGES.

Construction of Conduit in City Street — Negligence — Injury to Gas-pipe — Escape of Gas — Breach of Duty to Restore — Continuance — Cause of Action — Vendee of Gas Company — Tort — Duty to Minimise Damages — Reduction of Damages on Appeal — Costs.]—A gas company and the Provincial Hydro-Electric Department had each a right to place and maintain pipes and conduits in the public streets of a city. The company's pipes were laid there; those of the Department were being laid there by the defendant, under a contract with the Department, underneath the company's pipes; and, in the course of the work, through some want of care, one of the company's pipes was broken, and a quantity of gas escaped, both before and after the sale by the company to another company of all its property. The two companies joined in an action against the defendant to recover damages for the loss of the gas:—*Held*, that the right to lay the pipes of the Department was subject to the duty to disturb the other pipes

as little as reasonably could be, and to restore them, after disturbance; the whole cause of action did not arise when the break occurred; the duty was a continuing one; and both the plaintiffs were entitled to recover damages.—But the plaintiffs could not recover for losses which the exercise of ordinary care would have prevented—they owed the duty of taking all reasonable steps to mitigate the loss consequent upon the breach.—*Jamal v. Moolla Dawood Sons & Co.*, [1916] A.C. 175, followed.—On appeal, the plaintiffs' damages were reduced from \$1,323.05 to \$684; and no costs of the appeal were allowed (MASTEN, J., dissenting as to costs).—*Per* MASTEN, J.:—The action was in tort; the rule as to minimising damages is applicable to cases of tort, as well as contract: *Lavere v. Smith's Falls Public Hospital* (1915), 35 O.L.R. 98, 115; *Bateman v. County of Middlesex*, (1911-12), 24 O.L.R. 84, 87, 25 O.L.R. 137, 27 O.L.R. 122. The defendant should have the costs of the appeal, having substantially succeeded. *Hamilton Gas and Light Co. and United Gas and Fuel Co. v. Gest*, 132.

See CONTRACT, 1 — FRAUD AND MISREPRESENTATION — MASTER AND SERVANT, 1 — MUNICIPAL CORPORATIONS, 3 — NUISANCE — TRADE MARK — VENDOR AND PURCHASER, 2 — WATER, 1, 2.

DEATH.

See INSURANCE.

DEBENTURES.

See SCHOOLS.

DECEIT.

See FRAUD AND MISREPRESENTATION.

DEED.

See WATER, 1.

DEFAMATION.

See LIBEL.

DEPOSITIONS.

See CRIMINAL LAW, 3.

DIRECTORS.

See COMPANY, 1, 4.

DISCOVERY.

See COMPANY, 4.

DISCOVERY OF FRESH EVIDENCE.

See NEW TRIAL.

DISCRETION.

See INFANTS, 1.

DISORDERLY HOUSE.

See CRIMINAL LAW, 1, 2.

DISTRIBUTION OF ESTATES.

Real and Personal Property in Ontario and in Foreign State—Wills Act, R.S.O. 1914, ch. 120, sec. 20 (3) — Letters of Administration with Will Annexed — Grant by Ontario Court — Foreign Domicile at Time of Death—Will Made in Ontario by British Subject — Distribution according to Law of Succession of Country of Domicile.]—The testatrix died in 1915; she then was resident in

the State of New Jersey. She left a will made in Ontario in 1880; she was then a British subject. At her death, she owned real and personal property in Ontario and also in New Jersey. Upon an application to a Surrogate Court in Ontario by a trust company for a grant of letters of administration with the will annexed, a contestation arose, and the Judge of the Surrogate Court found that the will had been duly made and executed according to the law of Ontario, and that at the date of the execution of the will the testatrix was a British subject within Ontario. Letters of administration were accordingly granted to the trust company, and there was no appeal from the decision of the Surrogate Court:—*Held*, that the Surrogate Court Judge had power to grant letters of administration or letters probate, irrespective of the question of domicile: Wills Act, R.S.O. 1914, ch. 120, sec. 20 (3).—*Held*, however, that the will, though duly executed and free from defect in form, might be open to attack, either because the testatrix was, according to the law of the domicile, incapable of making a will, or because the will contravened the law of the domicile.—The letters granted in this jurisdiction should be regarded by the Court of another jurisdiction as conclusive, *quoad* form.—If the testatrix had, at the time of her death, acquired a domicile in New Jersey, the estate, real (New Jersey) and personal, vested in the trust company, was to be administered having regard to

the rules of succession in New Jersey. *Re Dartnell*, 483.

DIVIDENDS.

See COMPANY, 1.

DIVISION COURTS.

Action Improperly on List for Trial — Dismissal in Absence of both Parties — Order Setting aside Judgment — Powers of Judge — New Trial — Division Courts Act, secs. 79 (2), 104, 123, 226 — Motion for Prohibition—Refusal — Appeal — Costs.—The order of KELLY, J., 36 O.L.R. 504, refusing without costs a motion for prohibition to a Divisional Court, was affirmed with costs in the appellate Court to the plaintiff, respondent.—*Held*, by MEREDITH, C.J.C.P., that there is no authority for giving judgment in favour of either party when neither is present; when a case comes on for trial and neither party appears, the case should be struck from the docket or adjourned. Where a judgment has been irregularly entered, the Judge has power, under secs. 104 and 226 of the Division Courts Act, to set it aside, and order a trial; but, where the case has not been tried, the trial ordered is not a new trial.—*Per* RIDDELL, J.:—The case was, against the express direction of the Division Courts Act, sec. 79 (2), placed on the list for trial; and it must be treated as though it was not there at all. The Judge had no power to try the case at that time—the statute is imperative. There having been no “trial” in law, there could not be a “new

trial," and the time-limit in sec. 123 did not apply. *Re Arnold v. Cook*, 509.

See COURTS.

DIVISIONAL COURTS.

See APPEAL, 1, 2 — COURTS — HIGHWAY — JUDGMENT, 2.

DIVORCE.

See JUDGMENT, 1.

DOMICILE.

See DISTRIBUTION OF ESTATES — INFANTS, 2 — SURROGATE COURTS.

EASEMENT.

See CONTRACT, 2—WATER, 1.

ELECTION.

See ASSIGNMENTS AND PREFERENCES.

ENCROACHMENT.

See WILL, 3.

ENDOWMENT CERTIFICATE.

See INSURANCE, 4.

ENTRIES IN BOOKS.

See EVIDENCE.

EQUALIZATION OF ASSESSMENTS.

See ASSESSMENT AND TAXES, 1.

EQUITABLE EXECUTION.

See EXECUTION.

EROSION.

See NUISANCE.

EVIDENCE.

Vendor and Purchaser—*Agreement for Sale of Land* — *Delivery to Purchaser* — *Action by Purchaser against Executors of Deceased Vendor* — *Self-serving Entries Made by Deceased in Connection with Entry against Interest* — *Admissibility* — *Weight of Evidence* — *Specific Performance*.] — Entries made in books or documents by a deceased person may be evidence in an action by or against his personal representatives. The entry of a payment against the pecuniary or proprietary interest of the party making the entry has the effect of proving the truth of other statements contained in the same entry and connected with it, even if self-serving. The weight to be given to such evidence is for the jury or the Judge sitting without a jury.—*Held*, in an action by a purchaser for specific performance of an agreement for the sale and purchase of the vendor's whole interest in certain lots, the written agreement in his possession being produced and relied upon, that another document found among the vendor's papers after his death and after the lapse of eight years from the time the agreement was made, and entries of the vendor shewing that the agreement was for the sale of a half interest only, were admissible in evidence; but, upon the weight of the whole evidence, the agreement was for the sale of the entire estate of the vendor in the lands; and judgment was given for the plaintiff. *Clergue v. Plummer*, 432.

See CANADA TEMPERANCE ACT — CRIMINAL LAW, 3 — HIGHWAY — INFANTS, 1 — INSURANCE, 3 — INTERPLEADER — LUNATIC, 2 — MASTER AND SERVANT, 2 — NEGLIGENCE — NEW TRIAL — RAILWAY, 2 — SURROGATE COURTS — TRADE MARK — VENDOR AND PURCHASER, 1 — WILL, 1.

EXCHANGE OF LANDS.

See VENDOR AND PURCHASER, 1.

EXECUTION.

Enforcement against Company-shares — Beneficial Ownership of Debtor — Company with Head Office out of Ontario — Receiver by Way of Equitable Execution — Interim Order — Motion to Continue — Notice to Debtor — Charging Order — Judicature Act, sec. 140 et seq. — "Company in Ontario" — Execution Act, sec. 12 et seq. — Powers of Receiver — Right to Sell — Application to Amend Receiving Order.—Equitable execution is not a means of reaching assets which in their nature are not exigible, but is a means of freeing exigible assets from impediments in the way of execution and reaching them when such impediments prevent them being taken in ordinary course; it cannot be made the means of reaching assets not in the Province. — *Holmes v. Millage*, [1893] 1 Q.B. 551, followed. — A receiver by way of equitable execution cannot sell; his function is to receive and hold; and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the property sought

to be reached, unless the case can be brought within the provisions of sec. 140 *et seq.* of the Judicature Act, R.S.O. 1914, ch. 56 (dealing with charging orders). — *Flegg v. Prentis*, [1892] 2 Ch. 428, followed. — The plaintiff, having recovered in Ontario a judgment against the defendant for payment of a sum of money, obtained, *ex parte*, an order for a receiver, with a view to reaching shares in a company of which the defendant was said to be the beneficial owner. The company was a Dominion company, having a place of business in Ontario, but its head office was in Quebec:—*Held*, that the order should be regarded as an interim one, and a motion should be made (on notice to the defendant) to continue it.—*Quere*, whether the company was "a company in Ontario," within sec. 140 of the Judicature Act.—*Semble*, if a charging order were made, the receivership would be ancillary to it.—*Semble*, also, that the plaintiff's remedy was to make a seizure under the Execution Act, R.S.O. 1914, ch. 80, sec. 12 *et seq.* *Herold v. Budding*, 605.

See VENDOR AND PURCHASER, 3.

EXECUTION CREDITORS.

See BILLS OF SALE AND CHATTEL MORTGAGES.

EXECUTORS AND ADMINISTRATORS.

See EVIDENCE — WILL, 3.

EXEMPTIONS.

See ASSESSMENT AND TAXES.

EXPROPRIATION.

See HIGHWAY — MUNICIPAL CORPORATIONS, 3.

FAIR COMMENT.

See LIBEL.

FIRE INSURANCE.

See INSURANCE, 2, 3.

FORCIBLE ENTRY.

See NEW TRIAL.

FORECLOSURE.

See ASSIGNMENTS AND PREFERENCES — LAND TITLES ACT.

FOREIGN JUDGMENT.

See JUDGMENT, 1.

FOREIGN LAW.

See DISTRIBUTION OF ESTATES — INFANTS, 2 — SURROGATE COURTS.

FOREIGN PROPERTY.

See SURROGATE COURTS.

FRANCHISE.

See STREET RAILWAY, 1.

FRAUD AND MISREPRESENTATION.

Sale of Property of Company—Fraudulent Misrepresentations by Officers — Purchase by New Company — Insolvency of — Action by Liquidator for Rescission — Inability to Make Restitutio in Integrum — Fraud Practised not upon New Company but upon Shareholders — Damages for Deceit — Liability of Incorporated Company.]—An action brought by the liquidator of a company for the rescission (on the ground of fraud) of contracts, made by

W., the organiser of the company, and transferred to the company, for the purchase of the property of the defendants, also an incorporated company, and for general relief, was dismissed (MEREDITH, C.J.C.P., dissenting), on the ground that rescission was impossible, as there could be no *restitutio in integrum*, and that the defendants could not be cast in damages for fraud or deceit, because there was no evidence that the company in liquidation was deceived or that W. was deceived, and the fraud was practised upon the individual shareholders who purchased from W., and their right of action must be asserted by them individually. —*Per* MEREDITH, C.J.C.P., and RIDDELL, J., that it is not the law that “an incorporated company cannot in its corporate character be called on to answer in an action for deceit;” that proposition rests upon a dictum in *Western Bank of Scotland v. Addie* (1867), L.R. 1 H.L. Sc. 145, 166, 167; and is not in accord with such cases as *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, and *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351, 358. *Moncur v. Ideal Manufacturing Co.*, 361.

See BILLS OF SALE AND CHATTEL MORTGAGES — INSURANCE, 3, 4 — LAND TITLES ACT — TRADE MARK.

FRAUDULENT CONVEYANCES ACT.

See BILLS OF SALE AND CHATTEL MORTGAGES.

FRIENDLY SOCIETY.

See INSURANCE, 4.

FUTURE DAMAGES.

See NUISANCE.

GAMING.

See CRIMINAL LAW, 1.

GAS.

See DAMAGES.

GAS COMPANY.

See MUNICIPAL CORPORATIONS, 2.

GIFT.

Voluntary Bestowment in Joint Tenancy — Husband and Wife — Savings Bank Deposit — Survivorship.—To create a voluntary bestowment in joint tenancy, as distinct from a gift *inter vivos* or *mortis causa*, there must be unity of interest, unity of title, arising at one and the same time, and unity of possession—both joint tenants being seized *per mie et per tout*, each has an undivided moiety of the whole.—Where a man withdrew the money standing to his credit in a savings bank account, and redeposited it to the credit of a new account opened in the names of himself and his wife, giving the bank a written declaration, signed by both, that “all moneys deposited and that may be deposited by us and each of us to the credit of this account are our joint property, but they may be withdrawn by cheques made by either of us or the survivor of us,” it was held, after the death of the husband, that the

money was the property of the wife by right of survivorship.—The source of the money was immaterial, and after it became joint property it was not subject to being disposed of by the will of either party.—*Re Ryan* (1900), 32 O.R. 224, and *Everly v. Dunkley* (1912), 27 O.L.R. 414, applied and followed. *Weese v. Weese*, 649.

See LUNATIC, 2—WILL, 3, 4.

GUARANTY.

See COMPANY, 2 — MASTER AND SERVANT, 1.

GUARDIAN.

See INFANTS, 2.

HABEAS CORPUS.

See CRIMINAL LAW, 1.

HIGHWAY.

Expropriation of Land for — Toronto and Hamilton Highway Commission Act, 5 Geo. V. ch. 18, sec. 10 (O.)—Public Works Act, R.S.O. 1914, ch. 35, secs. 27, 29, 31, 32 — Compensation — Award or Decision of Ontario Railway and Municipal Board — Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, secs. 9, 52—Leave to Appeal to Appellate Division — Evidence — Conduct of Members of Board — Consultation with Member not Present at Hearing — Benefit from New Highway — Access — Frontage Tax — Set-off.—By the Toronto and Hamilton Highway Commission Act, 5 Geo. V. ch. 18, sec. 10 (O.), the Commission may expropriate land, and “shall have and may exercise the like

powers and shall proceed in the manner provided by the Public Works Act, where the Minister of Public Works takes land or property for the use of Ontario and the provisions of that Act shall *mutatis mutandis* apply:"—*Held*, having regard to secs. 27, 29, 31, and 32 of the Public Works Act, R.S.O. 1914, ch. 35, that when the Ontario Railway and Municipal Board acts in fixing compensation for land expropriated by the said Commission, it does so as a Board or Court, exercising the powers given to it by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186; and there is no pretence for saying that the members of the Board act as arbitrators merely.—Therefore, where two members of the Board, who had heard the evidence upon a proceeding before the Board for the purpose of fixing compensation for land expropriated for a new highway, allowed the third member, who had not heard the evidence nor previously taken part in the inquiry, to read the evidence and express his views regarding the case to them, before giving their decision, it could not be said that the decision was thereby vitiated: LENNOX, J., *dubitante*.—*Quære*, whether the Board was within its powers under sec. 9 or sec. 52 of the Ontario Railway and Municipal Board Act.—A Divisional Court of the Appellate Division refused leave to appeal from the decision of the Board in regard to compensation, being of opinion, after a full discussion and consideration of the evidence,

that the amount awarded was reasonable and just. *Re Toronto and Hamilton Highway Commission and Crabb*, 656.

See MUNICIPAL CORPORATIONS, 2 — STREET RAILWAY, 1, 2.

HOUSE OF ILL-FAME.

See CRIMINAL LAW, 2.

HUSBAND AND WIFE.

See GIFT — INTERPLEADER — JUDGMENT, 1 — LAND TITLES ACT.

IMPRISONMENT.

See CRIMINAL LAW, 1.

INDEMNITY.

See LUNATIC, 2.

INFANTS.

1. *Custody* — *Neglected Child* — *Children's Aid Society* — *Order of Commissioner of Juvenile Court* — *Foster-home Found by Society* — *Application of Father for Return of Child* — *Discretion of Court* — *Welfare of Infant* — *Evidence*. — *Onus* — *Apprentices and Minors Act*, R.S.O. 1914, ch. 147, secs. 3 (1), 4 — *Children's Protection Act of Ontario*, R.S.O. 1914, ch. 231, secs. 14, 27 — *Views of Infant as to Custody* — *Costs*.]—A female child, born in 1907, was, in 1913, her father having deserted his family and her mother being an inmate of a reformatory, taken by the Children's Aid Society of Toronto, upon an order made by the Commissioner of the Juvenile Court, pursuant to the Children's Protection Act of Ontario, R.S.O.

1914, ch. 231, and placed in a foster-home, where she was well cared for. In June, 1914, the parents came together again; and in March, 1915, proceedings were commenced by the father against the society and the foster-parents, upon *habeas corpus*, to compel the return of the child:—*Held*, that the parents by their conduct had opened the door for the benevolent work of the society, acting *in loco parentis* to the deserted child; and, the society's intervention having reached its culmination in finding a new and suitable home for the child, the Court ought not lightly to interfere with the *status quo*.—Sections 14 and 27 of the Children's Protection Act and secs. 3 (1) and 4 of the Apprentices and Minors Act, R.S.O. 1914, ch. 147, considered.—*In re McGrath*, [1893] 1 Ch. 143, 148, and *In re Goldsworthy* (1876), 2 Q.B.D. 75, 84, specially referred to.—The child being not yet 9 years old, it was not necessary to ascertain her views: R.S.O. 1914, ch. 147, sec. 3(1).—*In re Agar-Ellis* (1883), 24 Ch.D. 317, 326, specially referred to.—The onus was upon the father to shew that the removal of the child from the custody of the foster-parents would enure to her welfare, and that onus had not been discharged.—The father's application was refused *without costs*: the parent should not be penalised in any *bonâ fide* attempt, though ill-advised, to get back his child. *Re D'Andrea*, 30.

2. *Money Legacy to Infants Domiciled in Quebec — Testator*

Domiciled in Ontario — Tutor of Infants Appointed by Quebec Court — Right to Payment of Legacy — Law of Quebec — Inter-provincial Comity.] — Where a foreign guardian of infants is entitled by the law of the domicile of the infants to a fund of the infants in this Province, even where it is a trust fund under the control of the Court, the fund ought to be paid to him.—*Thiery v. Chalmers Guthrie & Co.*, [1900] 1 Ch. 80, *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15, and *Fletcher v. Rodgers* (1878), 27 W.R. 97, followed.—A tutor duly appointed by a Court in the Province of Quebec for infants domiciled there was *held*, entitled to be paid a sum bequeathed to the infants by a testator domiciled in Ontario and dying there—the law of Quebec being that the tutor of infants represents them, and is authorised and bound to collect and get in all their property, even property outside of Quebec.—*Hanrahan v. Hanrahan* (1890), 19 O.R. 396, applied. *Re Lloyd* (1914), 31 O.L.R. 476, explained. *Kelly v. O'Brian*, 326.

See CHARGE ON LAND.

INFORMATION.

See CANADA TEMPERANCE ACT.

INJUNCTION.

See APPEAL, 2 — NUISANCE — TRADE MARK.

INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES — BANKS AND BANKING—

COMPANY, 3, 4 — FRAUD AND MISREPRESENTATION.

INSPECTOR.

See SCHOOLS.

INSURANCE.

1. *Accident Insurance—Bodily Injury — Accidental Means—Recurrence of Former Disease by Reason of Accident—Warranty of Health — Disability Caused Exclusively by Accident—“Total Disability” — Findings of Fact of Trial Judge — Appeal.*] — The judgment of MIDDLETON, J., 35 O.L.R. 280, affirmed. *Mitchell v. Fidelity and Casualty Co. of New York*, 335.

2. *Fire Insurance — “Direct Loss or Damage by Fire” — Damage Caused by Freezing — “Property Owned by any other Person” — Statutory Condition 6 (a)—Goods not Paid for in Full — Property not Passing — Ownership of Assured — Order upon Insurers for Payment of Portion of Insurance Moneys to Stranger — Right of Assured to Recover — Protection of Rights of Strangers — Payment into Court—Notice.*] — In an action upon a policy insuring furniture and fittings of a shop against fire, it appeared that the fire in respect of which loss was alleged occurred in winter, and did not spread above the floor of the shop. In order to confine it below, the pipe and door of the furnace were taken off, with the result that the water froze in pipes and plumbing fixtures:—*Held*, that the damage was the immediate consequence of the fire and the method adopt-

ed of dealing with it, and so was recoverable as “direct loss or damage by fire.”—(2) By statutory condition 6 (a) (Ontario Insurance Act, sec. 194), an insurance company is not liable for the loss of property *owned* by any other person than the assured, unless the interest of the assured is stated in or upon the policy. The policy insured certain articles “the property of the assured,” and these were injured in consequence of the fire:—*Held*, that the plaintiff was entitled to recover for this portion of the loss, notwithstanding that these articles were not paid for in full, and that the ownership was not to pass to the plaintiff until payment in full—the goods being at his risk, and he being bound to keep them insured “with loss payable to the vendors as their interest may appear.” The articles were his “property” in the popular sense; and “owner” is not synonymous with “holder of an exclusive title.”—(3). The plaintiff had given an order upon the defendants to pay M. a sum of money out of the amount due upon the policy:—*Held*, that whether the order divested the plaintiff of the right to sue for that sum and vested it in M. could not be decided in the absence of M.; and, so far as appeared, the plaintiff’s right to sue was not affected.—It was ordered that the whole amount found due by the defendants should be paid into Court, and should not be paid out except on notice to M. and also to the vendors of the fountain and

accessories. *Drumbolus v. Home Insurance Co.*, 465.

3. *Fire Insurance — Stock in Trade — Proofs of Loss—Sufficiency — Absence of Objection—Refusal to Pay Claim — Proof of Value of Goods Insured—Proof of Damage — Extent of Damage — Fraud or False Statement in Statutory Declaration — Evidence — Onus — Statutory Conditions 18 and 20, R.S.O. 1914, ch. 183, sec 194—Stock-taking — Excessive Estimate of Damage — Insurance on Household Furniture and Building — Findings of Fact of Trial Judge — Appeal.*]

In an action upon fire insurance policies, proofs of loss having been sent to the defendants before action and further proofs offered if required, but not asked for:—*Held*, that it was not open to the defendants to set up the insufficiency of the proofs, if indeed it was open to them to object to the proofs when they had definitely rejected and refused to pay the plaintiff's claim or any part of it. *Morrow v. Lancashire Insurance Co.* (1898-9), 29 O.R. 377, 26 A.R. 173, referred to.—

(2) That, upon the evidence, the plaintiff had proved that the stock in the store at the time of the fire was of the value stated in the stock-sheet, about \$14,000; that the stock was damaged by smoke to the extent of \$2,000.—

(3) That the claim of the plaintiff was not vitiated by fraud or false statements in his declaration as to the matters mentioned in statutory condition 18, under sec. 194 of the Insurance Act, R.S.O. 1914, ch. 183. The onus

of proving fraud or false statements was upon the defendants, and there must be clear and satisfactory proof. According to the provisions of the 20th statutory condition, the fraud or false statement must be in a statutory declaration in relation to the particulars mentioned in the 18th condition.—(4) That the estimate made by the plaintiff of the damage that had been done to the stock by smoke was an excessive one, but not so excessive as to justify the conclusion that it was dishonestly and fraudulently made. To justify such a finding, the evidence ought to leave no room for any reasonable inference but that of guilt. —*Rice v. Provincial Insurance Co.* (1858), 7 U.C.C.P. 548, *Park v. Phoenix Insurance Co.* (1859), 19 U.C.R. 110, and *Parsons v. Citizens' Insurance Co.* (1878), 43 U.C.R. 261, followed. *Adams v. Glen Falls Insurance Co.*, 1.

4. *Life Insurance — Registered Friendly Society — Endowment Certificate — Proof of Age of Insured — Admission in Certificate — Absence of Allegation of Mistake or Fraud — Provisions of Insurance Contract and Constitution of Society — Statutory Admission — Insurance Act, R.S.O. 1914, ch. 183, sec. 166, sub-secs. 7, 9, 10, 11 — Amending Act, 6 Geo. V. ch. 36.*]

The judgment of BRITTON, J., 36 O.L.R. 507, was affirmed (GARROW, J.A., dissenting).—It was *held*, by the majority of the members of the Court, that the defendants (a registered friendly society) had admitted the age of the deceased

in the endowment certificate issued to him and now sued upon by his beneficiary, and that (having regard to the provisions of the contract and of the defendants' constitution), no further proof of age was necessary to entitle her to recover, mistake or fraud not being alleged or proved.—The effect of sub-secs. 7, 9, 10, and 11 of sec. 166 of the Insurance Act, R.S.O. 1914, ch. 183, and of the repeal of sub-sec. 11 by 6 Geo. V. ch. 36, and of the clauses substituted for it, was discussed. *Willoughby v. Canadian Order of Foresters*, 290.

5. *Live Stock Insurance—Construction of Policy — Proposal for Insurance — Delivery and Acceptance of Policy — Payment of Premium — Commencement of Period of Liability — Death Occurring after Acceptance, from Disease Contracted Earlier on Same Day—Completion of Contract — Mala Fides — Term of Policy.*—The plaintiff sued upon a policy issued by the defendants insuring her against the loss of an animal. She did not ask for or obtain interim insurance. By what was called a "proposal" for insurance, dated the 29th May, 1915, and signed by her, she applied for and obtained the policy, which was dated the 7th June, 1915, and was received by her early in the afternoon of the 8th June; about an hour later, she paid the premium; and the horse died about an hour after that, from an ailment contracted in the forenoon of the same day. The proposal stated that the defendants' "liability commences

after payment of the premium and receipt of policy or protection note by the insured;" and she thereby agreed that her declarations therein contained should be the basis of the contract between her and the defendants, "subject to the conditions of the policy." That agreement was recited in the policy; and the contract of the defendants, as set out in the policy, was, that if, after receipt of the policy and payment of the premium for an insurance up to noon on the day of the expiry (the 7th September, 1915), the animal should during that period die from any accident or disease thereby insured against, occurring or contracted after the commencement of the defendants' liability thereunder, the defendants should be liable to pay to the plaintiff the sum insured:—*Held*, that the defendants were not liable upon the policy because the death occurred from disease contracted before the liability began.—The plaintiff's lack of good faith in taking the policy and speedily paying the premium without informing the defendants of the changed conditions was fatal to her claim. *Sharkey v. Yorkshire Insurance Co.*, 344.

See WILL, 3.

INTEREST.

See VENDOR AND PURCHASER, 2.

INTERPLEADER.

Parties to Issue — Who should be Plaintiff — Onus — Husband and Wife — Possession of Married Woman—Primâ Facie Right —

Ownership of Land and Goods.]—

A sheriff having seized goods under an execution against a married man, the goods were claimed by his wife, and an interpleader issue between the execution creditor and the claimant was directed to be tried:—*Held*, that the execution creditor was properly made plaintiff in the issue, the claimant being the owner of the house in which the goods were seized, and so in apparent possession of them; and it made no difference that her title to the house and land was attacked by the execution creditor in another proceeding still pending, for it was not to be assumed that she would not maintain her title.—*Farley v. Pedlar* (1901), 1 O.L.R. 570, and *Hogaboom v. Grundy* (1894), 16 P.R. 47, followed.—A married woman now stands in the same position as any one else; and, once it is shewn that the goods are actually in her possession, *prima facie* they are hers as against all the world.—Dictum of STRONG, J., in *Crowe v. Adams* (1892), 21 S.C.R. 342, 344, disented from.—Discussion as to the form of an interpleader issue is usually idle: *Bryce Brothers v. Kinnear* (1892), 14 P.R. 509, 510, 511. *Young v. Spofford*, 663.

INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT — CONSTITUTIONAL LAW.

INVESTMENTS.

See LUNATIC, 1—SOLICITOR.

JOINT TENANCY.

See GIFT.

JUDGES.

See ASSESSMENT AND TAXES, 3
—COURTS.

JUDGMENT.

1. *Foreign Judgment — Action on — Decree for Divorce with Alimony — Claim for Arrears — Jurisdiction — Finality of Judgment — Penal Action — Effect of Remarriage of Husband.] —* A judgment of a Court of the State of New York dissolving the marriage of the plaintiff and defendant, and ordering the defendant to pay the plaintiff \$50 per month for the support and maintenance of herself and child, was *held*, to be a final judgment, at all events as to the amounts past due; and in an action thereon, in the Supreme Court of Ontario, the plaintiff recovered judgment for arrears of the payments ordered to be made.—*Swaizie v. Swaizie* (1899), 31 O.R. 324, and *Robertson v. Robertson* (1908), 16 O.L.R. 170, approved.—The objection that the judgment was one recovered in a penal action was not sustainable.—*Huntington v. Attrill*, [1893] A.C. 150, *Raulin v. Fischer*, [1911] 2 K.B. 93, followed.—The remarriage of the husband does not render his obligation under the judgment invalid as contrary to the moral rules upheld by English law. *Wood v. Wood*, 428.

2. *Mistake in Judgment as Entered — Appeal from Judgment on other Grounds — Dismissal of Appeal by Consent — Subsequent Motion before Trial Judge to Correct Mistake — Jurisdiction of Trial Judge — Application to*

Appellate Court — Delay in Applying — Making Formal Judgment Conform to Judgment Pronounced — Solicitor's Slip—Order Relieving against—Terms.]—The judgment of the trial Judge was pronounced on the 14th July, 1914. In drawing up the judgment, there was inserted, by slip or mistake, a word which was not justified by the judgment as pronounced, and which made a material difference in the result. The defendants appealed, but not upon any ground relating to the insertion of the word referred to. By consent, the appellate Court, on the 5th November, 1914, dismissed the appeal without costs. The defendants on the 11th December, 1914, applied to the trial Judge to amend the judgment; he refused to entertain the application. Nearly two years after the pronouncing of the original judgment, the defendants applied to the appellate Court for relief; and upon the application the plaintiff consented to its being treated as an appeal from the refusal of the trial Judge to entertain the motion:—*Held*, that the Court had power to correct such a mistake; that the trial Judge was the most competent to do it, and was not *functus officio*; and, no substantial change having taken place in the position of the parties, that the defendants should be declared at liberty (upon terms as to costs, right of appeal, etc.) to apply to the trial Judge to correct the mistake alleged, so as to make the formal judgment conform to the judgment as pronounced; RIDDELL, J., dissenting.—Rules 521, 522,

and 523, considered.—*Prevost v. Bedard* (1915), 51 S.C.R. 629, specially referred to. *Kidd v. National Railway Association*, 381.

See APPEAL, 2 — DIVISION COURTS — VENDOR AND PURCHASER, 3.

JUDICIAL COMMITTEE.

See APPEAL, 3.

JURISDICTION.

See ASSESSMENT AND TAXES, 1 — CANADA TEMPERANCE ACT, 1, 2 — COMPANY, 4 — COURTS — CRIMINAL LAW, 2 — JUDGMENT, 1, 2.

JURY.

See MASTER AND SERVANT, 2 — NEGLIGENCE — RAILWAY, 2.

KEEPING DISORDERLY HOUSE.

See CRIMINAL LAW, 1, 2.

LACHES.

See JUDGMENT, 2 — PROMISSORY NOTE — TRADE MARK.

LAND.

See APPEAL, 2 — CHARGE ON LAND — COMPANY, 4 — CONTRACT, 2 — HIGHWAY — LAND TITLES ACT — LUNATIC, 2 — MECHANICS' LIENS — MUNICIPAL CORPORATIONS, 2 — VENDOR AND PURCHASER.

LAND TITLES ACT.

Assignment of Charge—"Subject to the State of Account" — R.S.O. 1914, ch. 126, sec. 54 (4) — *Conveyancing and Law of Property Act*, R.S.O. 1914, ch. 109,

secs. 2, 7 — *Charge Executed in Blank — Moneys Advanced by Assignee Misappropriated by Husband of Chargee—Right of Assignee to Enforce Charge—Fraud—Mortgage — Foreclosure.*—Section 54 of the Land Titles Act, R.S.O. 1914, ch. 126, must be read in conjunction with secs. 2 and 7 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109.—By sub-sec. 4 of sec. 54, every transfer of a charge shall be subject to the state of account upon the charge between the chargor and the chargee:—*Held*, in the circumstances of this case —no notice having been brought home to the plaintiff, the registered assignee of a charge by way of mortgage, that the consideration acknowledged by the chargor had not in fact been paid by the chargee— that the plaintiff was not thereby affected: it is only in so far as the chargor has made payments to the chargee subsequent to the date of the charge that the assignee can be affected by the “state of account.”—*Held*, also, that the plaintiff had a right to treat her assignor as the holder of a valid charge; the chargor, rather than the plaintiff, must suffer for the indiscretion which led to the commission of a fraud by C., who obtained from the plaintiff and misappropriated the money she had agreed to advance upon the assignment of the charge.—The plaintiff was, therefore, *held*, entitled to enforce her charge by foreclosure. *Dodds v. Harper*, 37.

LEASE.

See CONTRACT, 2.

LEGACY.

See INFANTS, 2.

LIBEL.

Newspaper — Conspiracy — Pleading — Defences — Agreement for Rightful Purpose — “Fair Comment” — Inducement — Payment into Court — Amends — Libel and Slander Act, secs. 7, 8, 9 — Particulars — Appeals in Matters of Practice — Costs.—In an action against the editors and publishers of a newspaper, begun as an action for libel, as shewn by the endorsement of the writ of summons, the statement of claim contained charges of conspiracy. Paragraph 4 of the statement of defence was to the effect that the plaintiff was not a desirable person for the municipal office which he sought, that it was not in the public interest that he should be elected, that the electors were opposed to his election, that the defendants desired, in the public interest, to secure his defeat, and therefore endeavoured *bonâ fide* and without malice and without conspiracy with any other person to prevent the election of the plaintiff:—*Held*, that this was no defence to an action for conspiracy—it did not raise an issue as to whether the acts to be done were according to law. If it was intended to be a plea to damages, it should so state specifically; and, if it was intended to make the allegations part of the defence of “fair comment,” they should be pleaded properly and specifically in that way.—Paragraph 6 (a) was to the effect that the plaintiff had invited

public criticism in relation to his candidature:—*Held*, that this, while not not a defence *per se*, contained matter of inducement, and was not objectionable.—Paragraph 6 (e), being the ordinary defence of fair comment, was not objectionable. The plaintiff was entitled to particulars under that defence.—If the paragraphs complained of could be pleaded in a libel action proper, they were not wrong in an action for conspiracy.—By para. 8, the defendants, by way of alternative defence, and while denying any liability, said that \$5, which sum they brought into Court, was sufficient to satisfy the plaintiff's claim:—*Held*, by MULOCK, C.J. Ex., in Chambers, that secs. 7 and 8 of the Libel and Slander Act, R.S.O. 1914, ch. 71, applied to this action, and the defendants, as authorised by sec. 9, were entitled, with their defence, to pay money into Court by way of amends; and this paragraph was not objectionable.—*Held*, also, that statements in the particulars delivered by the defendants by which they assumed to reserve a right to deliver further particulars were of no avail to the defendants; they might properly be stricken out; but they did not prejudice the plaintiff; and there was no reason why further time for delivering particulars should not be allowed. *Foster v. Maclean*, 68.

LICENSE.

See CONTRACT, 2.

LIEN.

See LUNATIC, 2 — MECHANICS' LIENS.

LIFE INSURANCE.

See INSURANCE, 4.

LIMITATION OF ACTIONS.

See RAILWAY, 1 — STREET RAILWAY, 2.

LIQUOR LICENSE ACT.

See CONSTITUTIONAL LAW.

LIVE STOCK INSURANCE.

See INSURANCE, 5.

LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES, 2.

LOCAL OPTION.

See CONSTITUTIONAL LAW.

LUNATIC.

1. *Committee — Trust Company — Investment of Moneys of Estate — Payment into Court — Lunacy Act, sec. 11 (d).*—A trust company appointed committee of the estate of a lunatic can, under its statutory powers, act without giving security; but this does not enlarge its powers in dealing with the funds of the lunatic's estate. Yearly balances must be paid into Court: sec. 11 (d) of the Lunacy Act, R.S.O. 1914, ch. 68; and this rule must be strictly followed.—*Re Norris* and *Re Drope* (1902), 5 O.L.R. 99, 101, and *Re Rourke* (1915), 33 O.L.R. 519, followed.—The report of a Master authorising the investment and re-investment by a company-committee of the lunatic's funds and the application of the interest and part of the capital for his maintenance, was varied, upon motion for its confirmation, by directing payment into Court. *Re Hunter*, 463.

2. *Order Declaring Lunacy and Appointing Committee — Discharge from Asylum — Order not Superseded — Moneys Paid out of Lunatic's Estate by Committee upon Lunatic's Order — Gifts — Invalidity — Evidence — Investigation as to Mental Capacity — Lunacy Act, secs. 3, 6, 7, 10 — Liability of Estate of Committee to Account — Indemnity from Donees — Following Moneys into Lands Purchased — Lien — Requisition.*]—In 1908, an order was made by a Judge declaring R. a lunatic and appointing a committee of his estate. [He was at that time confined in an asylum for the insane, from which he was discharged in 1910. In 1911, the committee, upon written orders signed by R., gave considerable sums of money, out of R.'s estate, to his nephew and niece, who each purchased land with the money so given, and each took a conveyance in his and her own name. The order declaring lunacy had not then been and was not afterwards reversed or superseded. After the death of R. and the death of the committee, this action was brought by R.'s executors, against the executrix of the committee and the nephew and niece, to recover the money so given:—*Held*, that the plaintiffs were entitled to recover; for R., while the order declaring him a lunatic remained unrevoked and in force and the committee undischarged, was incapable of so dealing with his estate; and, apart from the order, R. was, when the gifts were made, upon the evidence taken at the trial, of unsound

mind.—Sections 3, 6, 7, and 10 of the Lunacy Act, R.S.O. 1914, ch. 68 considered.—*In re Walker*, [1905] 1 Ch. 160, followed.—*Semble*, that the plaintiffs were entitled to follow the moneys into the lands purchased, and to a lien thereon and realisation by sale.—And *held*, that the defendant the executrix of the committee was entitled to indemnity from her co-defendants, but not to a lien upon the lands purchased.—Inquiry into R.'s mental capacity, while the order declaring him a lunatic stood, was incompetent, and the investigation which took place at the trial should not have been entered upon. *Rourke v. Halford*, 92.

MAINTENANCE.

See WILL, 3.

MARRIAGE.

See WILL, 3.

MASSSES.

See WILL, 4.

MASTER AND SERVANT.

1. *Contract of Hiring—Breach — Damages — Salary for Unexpired Portion of Term of Hiring — Mitigation according to Chances of Obtaining Employment — Profits of Business Venture—Guaranty.*]—The damages to be recovered by servant against master for breach of the contract of hiring are to be compensation for the actual loss sustained by the breach. Where the servant does not seek new employment, his failure to do so does not deprive him of his rights; the jury or Court must mitigate the dam-

ages by estimating his chance of having obtained employment if he had sought it; and the same principle applies where the servant does not choose to remain in idleness, but undertakes an entirely different occupation, or enters upon business for himself.—In an action upon a guaranty, brought against the administrators of the deceased's guarantor's estate, it was *held*, that damages for breach of a contract of hiring should be assessed without regard to the profits made by the plaintiff upon a commercial venture in which he embarked his capital after his employment ceased; and the damages, mitigated upon an estimate of his chance of having obtained employment if he had sought it, were fixed at \$4,000. *Cockburn v. Trusts and Guarantee Co.*, 488.

2. *Liability of Master for Negligence of Servant—Scope of Employment — Finding of Jury — Evidence.*] — The defendant P. was a sales-agent for the defendant company; he sold and delivered their wares, and was paid for his services by a commission on the price of the goods. There was nothing to shew whether he was bound to give any specified time to the sale and delivery. He was bound to use a horse and vehicle owned by an agent of the company, in selling and delivering some of the goods, and in some other work in regard to them, and to pay the owner, through the company, hire for the use of the horse and vehicle, which, he said, were not used by

him for any other purpose. P. was driving the horse and vehicle to the place where they were kept, after his day's work was done, when the horse ran into the plaintiff upon the highway and injured him. It was found by the jury that P. was blameable for the injury; and it was *held*, that there was evidence upon which reasonable men might find that P. was, at the time of the injury to the plaintiff, acting within the scope of an employment by the company and doing his duty under their directions, although also engaged in his own business of earning his commission; and a judgment for the plaintiff against the company was affirmed. *Duffield v. Peers*, 652.

See COVENANT—NEGLIGENCE.

MECHANICS' LIENS.

Public School Lands — Erection of School House — Liens of Sub-contractors — Liability of Lands — Status of Assignee for Benefit of Creditors of Contractor — Mechanics and Wage-Earners Lien Act, secs. 2 (c), 3 — Public Schools Act, secs. 55, 73 — Time for Registering Claim of Lien of Sub-contractor — Work Done after Materials Placed in Building — Concurrence of Owner, Contractor, and Sub-contractor — Secs. 16 and 22 (2) of Lien Act.]—In actions brought by sub-contractors against the contractors for the erection of a public school building upon public school land, the assignee of the contractors for the benefit of creditors, and the school trustees, to enforce liens

under the Mechanics and Wage-Earners Lien Act, it was *held*, that the assignee had the right to contend that the land was not subject to such liens, although the point was not raised by the trustees.—(2) That land held by public school trustees for public school purposes is within the provisions of the Act.—Sections 2 (c) and 3 of the Mechanics and Wage-Earners Lien Act and secs. 55 and 73 of the Public Schools Act considered.—(3) It being objected that the lien-claim of one of the sub-contractors was not registered in time, it was *held*, that the question when the time finally ran out was mainly a question of fact; and, upon the facts, the additional work having been done with the concurrence of the contractors, sub-contractors, and owners, through the architect, the time for registration did not run out until thirty days after the completion of the additional work; and the registration was in time.—Sections 16 and 22 (2) of the Act considered. *Benson v. Smith & Son, A. B. Ormsby Co. v. Smith & Son*, 257.

MISCONDUCT.

See SOLICITOR.

MISDIRECTION.

See CRIMINAL LAW, 3.

MISFEASANCE.

See COMPANY, 4.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MISTAKE.

Money Voluntarily Paid for Taxes under Mistake of Law — Right to Recover — Change in Law by University Act, 6 Edw. VII. ch. 55, sec. 18 (O.)—By sec. 18 of the University Act, 1906, 6 Edw. VII. ch. 55 (O.), the property of the University of Toronto shall not be liable to taxation, but the interest of every lessee of its real property shall be liable to taxation. The plaintiff was the owner of a house, erected upon land owned by the University and leased for 39 years by a lease which was assigned to him in 1904. The change in the law effected by this enactment was not discovered by the plaintiff till 1914 or 1915, and the property continued to be assessed by the city corporation, as theretofore, upon the basis of its actual value, and the plaintiff paid the taxes upon the assumption that he was liable, the defendants also having no knowledge of the change.—An action to recover a sum representing the difference between the taxes upon the fee and the taxes upon the leasehold for each of the years 1907 to 1913, was dismissed upon the ground that the payments were made voluntarily—both parties being ignorant of the change in the law.—Money paid under a mistake of law cannot be recovered.—Suggested exceptions considered and authorities referred to.—The law concerning which there was ignorance here must be regarded as part of the general law of the land.—*Cushen v. City of Hamilton* (1902), 4 O.L.R. 265, followed. *Durrant*

v. *Ecclesiastical Commissioners* (1880), 6 Q.B.D. 234, distinguished. *O'Grady v. City of Toronto*, 139.

See INSURANCE, 4 — JUDGMENT, 2.

MORTGAGE.

Exercise of Power of Sale — Notice — Absence of Signature of Mortgagee — Fatal Defect—Sale Set aside — Costs — Set-off — Rights of Purchaser against Mortgagee.—Under a power of sale, in the statutory form, contained in a mortgage-deed, the mortgagee sold the land. The extension of the short form enabled the mortgagee to exercise the power after written notice to the mortgagor. A notice was served by the mortgagee upon the mortgagor; in the body of it the names of the mortgagor and mortgagee were mentioned, but it was not signed by the mortgagee, and there was nothing to shew that it was given by him, nor was it addressed to the mortgagor:—*Held*, that the absence of the signature of the mortgagee was fatal: it is essential that the identity of the person giving the notice should in some way sufficiently appear in the notice itself, and that the notice should be a completed and not an obviously incomplete document.—The sale based upon the defective notice was set aside, in an action brought by the mortgagor against the mortgagee and the purchaser. The mortgagor was allowed his costs of the action against the mortgagee, to be set off *pro tanto* against the mort-

gage-debt; and the mortgagee was ordered to pay his co-defendant's costs and to refund the sale deposit. *Ansell v. Bradley*, 142.

See ASSIGNMENTS AND PREFERENCES — BANKS AND BANKING — CHARGE ON LAND — LAND TITLES ACT.

MOTOR VEHICLES ACT.

Negligence of Person Driving Vehicle without Authority — Liability of Owner — R.S.O. 1914, ch. 207, sec. 19 — Amendment by 4 Geo. V. ch. 36, sec. 3 — Person in "Employ" of Owner — "Stolen it from the Owner."—Section 19 of the Motor Vehicles Act, R.S.O. 1914, ch. 207, as amended by 4 Geo. V. ch. 36, sec. 3, provides that the owner of a motor vehicle shall be responsible for any violation of the Act, unless at the time of such violation the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner.—*S.*, the foreman of a repair-shop, where the defendant's motor vehicle had been repaired, took it out to test it; but, having done so, instead of returning it to the shop, continued to drive it for his private purposes, without any authority from the defendant, and, in doing so, by his negligence injured the plaintiff:—*Held*, that *S.* was not in the "employ" of the defendant; that he had stolen the vehicle from the defendant; and that the defendant was not liable for the plaintiff's injury. *Hirshman v. Beal*, 529.

MUNICIPAL CORPORATIONS.

1. *By-law respecting Emission of Smoke — Municipal Act, R.S.O. 1914, ch. 192, sec. 400 (45)—* *Convictions of Railway Company for Offences against By-law — Locomotives in Round-house — Ventilating Flue — “Flue, Stack or Chimney” — Dominion Board of Railway Commissioners — Regulations — Offence against — Offence Committed by another Railway Company.*] — The defendants, a Dominion railway company, were convicted by the Police Magistrate for a city of two offences against a by-law of the city passed pursuant to sec. 400 (45) of the Municipal Act, R.S.O. 1914, ch. 192. It appeared that the smoke complained of was emitted by locomotive engines standing in the railway round-house; the smoke passing up the ventilating flue or chimney of the round-house. One of the offences was the emission of smoke by a locomotive of another railway company, standing in the defendants' round-house:—*Held*, that the ventilating flue of a round-house is not a “flue, stack or chimney,” within the meaning of the statute.—*Rex v. Canadian Pacific R.W. Co.* (1915), 33 O.L.R. 248, followed.

—(2) That, if the evidence disclosed an offence against the regulations of the Dominion Board of Railway Commissioners, it would not be proper to amend the convictions so as to bring them under the regulations.—

(3) That, it not being shewn that the other railway company were authorised by the defendants to

do what constituted one of the offences, the defendants could not be made criminally liable therefor. *Rex v. Grand Trunk R.W. Co.*, 457.

2. *Construction of Sewer in Highway — Necessary Lowering of Gas-pipes — Expense of — Liability for — Rights of Gas Company in Soil — 11 Vict. ch. 14 — Injurious Affection of Land — Right to Compensation—Municipal Act, 3 & 4 Geo. V. ch. 43 (R.S.O. 1914, ch. 192), sec. 325.]*—The judgment of a Divisional Court in *City of Toronto v. Consumers Gas Co.* (1914), 32 O.L.R. 21, affirmed by the Judicial Committee. *City of Toronto v. Consumers Gas Co.*, 586.

3. *Expropriation of Land — Compensation and Damages — Claims by Owner, Lessee, and Sublessee — Value of Land — Damages for Severance — Incidental Damages — Changes in Proposed Building — Delay — Award — Appeal.*]—Land at the corner of two streets in a city was leased by the owner upon a building lease for 21 years from the 1st May, 1911. In 1913, the buildings having been pulled down, the lessee proposed to build a theatre upon the land and to sublet the property for the remainder of the term (except one day) to a firm who were to operate the theatre; but on the 21st April, 1913, the city council passed a by-law to expropriate a part of the land—a quadrant of 20 foot radius from the corner. This necessitated a change in the plans of the build-

ing and an increase in the cost of it. The sublessees, however, accepted a demise of the premises subject to the by-law, at the same rental as had been stipulated for before, and their lessor was to go on with the building; he transferred to them all his claims against the city corporation for damages and compensation, except his claim for increased cost of the proposed building; and an award was made by which the corporation were ordered to pay to the owner, the lessee, and the sublessees, each a sum as compensation and damages for their respective losses by reason of the expropriation:—*Held*, on appeal from the award, that the elements of damages and compensation were: (1) the value of the land taken; (2) damages for severance, if any (sec. 325 (4) of the Municipal Act, R.S.O. 1914, ch. 192); and (3) other damages.—There being no evidence that the remainder of the land was rendered less valuable by the severance, nothing should be allowed under that head.—The sums to be allowed to the claimants respectively and the proper method of fixing them was pointed out, and the award varied in some respects.—The sum of \$1,000 allowed to the lessee, as part of his incidental damages, for the delay in building caused by his operations was reduced to \$100 (*MASTEN, J.*, dissenting). *Re O'Neil and City of Toronto*, 446.

See ASSESSMENT AND TAXES—CONSTITUTIONAL LAW—STREET RAILWAY, 1, 2.

MURDER.

See CRIMINAL LAW, 3.

NAME.

See TRADE MARK.

NAVIGABLE RIVER.

See WATER, 2.

NEGLECTED CHILD.

See INFANTS, 1.

NEGLIGENCE.

Railway — Servant's Death while Uncoupling Cars — Unpacked Frog — Findings of Jury — Evidence — Failure to Connect Negligence Found with Death — Inferences — New Trial.—In an action for damages for the death of the plaintiff's husband by reason of the negligence of the defendants, his employers, while he was engaged in uncoupling cars, there was evidence, which the jury rejected, that the deceased had gone in voluntarily between the cars when the train was in motion; the jury found negligence causing the accident, namely, "frog not properly packed," and negatived contributory negligence, but did not indicate the connection between the negligence they found and the accident, as they were directed to do:—*Held*, that the jury should have indicated how or why the want of packing was the cause of the death—there was a want of proper evidence of direct causal negligence and an absence of intelligible expression by the jury of what they thought was a reasonable inference, there being at least three explanations which

might be accepted; and a new trial was ordered.—*McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, distinguished. *Ryan v. Canadian Pacific R.W. Co.*, 543.

See DAMAGES — MASTER AND SERVANT, 2 — MOTOR VEHICLES ACT — RAILWAY — SOLICITOR — STREET RAILWAY, 2 — WATER, 2.

NEGOTIABLE PAPER.

See VENDOR AND PURCHASER, 1.

NEW TRIAL.

Action against Police Constable — Forcible Entry and Arrest without Warrant — Defence — Justification — Reasonable Grounds for Belief that Offence Committed — Criminal Code, sec. 30 — Leave to Amend — Discovery of Fresh Evidence.]—In an action against a police constable for forcibly entering upon the plaintiff's premises without a warrant and arresting and assaulting her, the jury found that the defendant did as the plaintiff alleged, and that the plaintiff was not at the time keeping a common bawdy-house, and judgment for the plaintiff was pronounced by the trial Judge.—The defendant desired but was not permitted at the trial to set up that all he did was done in the belief, on reasonable and probable grounds, that the plaintiff had committed an offence against the Criminal Code for which she might be arrested by him without a warrant:—*Held*, that, upon proof of this, the defendant might be considered justified in

making the arrest, whether the offence had been committed or not (Criminal Code, sec. 30); and that there should be a new trial, with leave to both parties to amend the pleadings, in order that the real matters in question between the parties might be determined.—The defendant, in moving for a new trial, relied also on the discovery of fresh evidence; but that alone would not have warranted the granting of a new trial. *Altman v. Majury*, 608.

See CRIMINAL LAW, 3—DIVISION COURTS — NEGLIGENCE — RAILWAY, 2.

NEWSPAPER.

See LIBEL.

NOTICE.

See CONTRACT, 2 — EXECUTION — INSURANCE, 2—MORTGAGE — STREET RAILWAY, 2.

NUISANCE.

Railway — Building Embankment in River — Absence of Authority of Board of Railway Commissioners — Changing Course of Water of River—Erosion of Shore — Washing away of Valuable Sand and Gravel— Continuing Nuisance — Damages — Assessment of Future Damages in Lieu of Mandatory Injunction — Judicature Act, R.S.O. 1897, ch. 51, sec. 58 (10).]—The plaintiffs, the owners of a block of land at the mouth of a river, complained that the defendants had constructed an embankment part

of the way across the bed of the river, which narrowed the stream, and was so constructed as to throw the waters of the river with great force against the bank on the plaintiffs' side, by the effect of which valuable sand and gravel were washed away from the plaintiffs' lands:—*Held*, upon the evidence, that the embankment was built without the authority or sanction of the Board of Railway Commissioners.—(2) That, in erecting the embankment and thereby closing the south channel of the river, the defendants had created a continuing nuisance.—(3) That the effect of the embankment was to turn much larger quantities of water in times of high water and freshets to the north shore than had previously flowed there; and that the flow of water to the north, the deepening of the north channel, and the erosion of the shore, were all accelerated and increased by the building of the embankment.—(4) That one half of the loss suffered by the plaintiffs was caused by the embankment.—(5) That in lieu of a mandatory injunction to restore the south channel, damages should be awarded to the plaintiffs: *Judicature Act*, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 10; and future damages were assessed, subject to a reference, if desired.—*Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, specially referred to. *Cadwell & Fleming v. Canadian Pacific R.W. Co.*, 412.

See STREET RAILWAY, 2.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See HIGHWAY.

ORIGINATING NOTICE.

See WILL, 4.

PARENT AND CHILD.

See INFANTS, 1.

PARTICULARS.

See LIBEL.

PARTIES.

See COMPANY, 1 — INTERPLEADER — MECHANICS' LIENS.

PASSING OFF.

See TRADE MARK.

PAYMENT.

See MISTAKE — VENDOR AND PURCHASER, 1.

PAYMENT INTO COURT.

See INSURANCE, 2 — LIBEL — LUNATIC, 1.

PAYMENT OUT OF COURT.

See APPEAL, 3.

PENAL ACTION.

See JUDGMENT, 1.

PENALTY.

See SOLICITOR.

PERPETUITY.

See WILL, 4.

PLEADING.

See LIBEL.

POLICE MAGISTRATE.

See CANADA TEMPERANCE ACT, 1, 2—CRIMINAL LAW, 1.

POSSESSION OF LAND.*See* APPEAL, 2.**POWER OF SALE.***See* MORTGAGE.**PRACTICE.**

See APPEAL — COMPANY, 4—
DIVISION COURTS — EXECUTION
— INTERPLEADER — JUDGMENT,
2 — LIBEL — LUNATIC, 1—SUR-
ROGATE COURTS.

PRESENTMENT.*See* PROMISSORY NOTE.**PRIVILEGE.***See* COMPANY, 3.**PRIVY COUNCIL.***See* APPEAL, 3.**PRODUCTION OF DOCUMENTS.***See* COMPANY, 4.**PROHIBITION.***See* DIVISION COURTS.**PROMISSORY NOTE.**

Demand Note — Accommodation Endorsers — Advances by Bank — Defences to Action against Endorsers — Agreement for Payment — Evidence — Unreasonable Delay in Presentment — “Continuing Security” — Collateral Security — Assent of Endorsers — Bills of Exchange Act, sec. 181 — Findings of Trial Judge — Appeal.—A promissory note, dated in June, 1912, payable on demand, made by a mercantile company in favour of three of its directors, and endorsed by them to the company's bankers, the plaintiffs, was presented for

payment in January, 1916, but not before:—*Held*, in an action against the endorsers, that their defence based upon an alleged agreement, made at the time of the deposit of the note with the plaintiffs, and the making of advances thereon, that the note should be paid by the first money of the company deposited with the plaintiffs, it being known to the plaintiffs that the defendants were endorsers for accommodation merely, failed upon the evidence.—*Held*, also, that the note had not become paid on occasions where there was a balance exceeding the amount of the note to the credit of the company in its current account.—*Held*, also, that, with the assent of the defendants, the note was delivered to the plaintiffs as collateral or continuing security for advances made by the plaintiffs to the company upon its current account, and that at the time when the company made an assignment for the benefit of creditors, about a year before the presentment of the note, the amount due to the plaintiff upon the current account exceeded the amount of the note; and, therefore, the defendants were not excused by non-presentment within a reasonable time, so long as the plaintiffs held the note, according to the terms of its original deposit, as collateral security, with the privity of the endorsers.—Construction of sec. 181 of the Bills of Exchange Act, R.S.C. 1906, ch. 119.—*Merchants Bank of Canada v. Whitfield* (1881), 2 Dorion (Que.) 157, approved.—*Chartered Mercantile Bank of*

India London and China v. Dickson (1871), L.R. 3 P.C. 574, distinguished. *Bank of Ottawa v. Christie*, 330. Affirmed, 646.

PROMOTERS.

See COMPANY, 1.

PROOFS OF LOSS.

See INSURANCE, 3.

PROVINCIAL LEGISLATURE.

See ASSESSMENT AND TAXES,
3 — CONSTITUTIONAL LAW.

PUBLIC AUTHORITIES PROTECTION ACT.

See STREET RAILWAY, 2.

PUBLIC SCHOOLS.

See MECHANICS' LIENS —
SCHOOLS.

PUBLIC UTILITIES ACT.

See STREET RAILWAY, 2.

PUBLIC WORKS ACT.

See HIGHWAY.

QUEBEC LAW.

See INFANTS, 2.

RAILWAY.

1. *Crossing by Street Railway — Order of Board of Railway Commissioners for Canada — Construction of Diamond by Street Railway Company — Liability for Maintenance — Derailment of Train — Failure to Shew Negligence or Breach of Duty — Limitation of Actions — "Construction or Operation of the Railway" — Dominion Railway Act, sec. 306 — Ontario Railway Act, sec. 265 (1).* — The defendants, having applied to the Board of Rail-

way Commissioners for Canada for authority to cross at grade the plaintiffs' tracks at a certain point, were, in June, 1904, permitted to do so, by an order of the Board, which directed that they (the defendants) should at their own expense provide a diamond for the crossing. The diamond was carefully and efficiently built. In September, 1912, some cars of the plaintiffs passing over the diamond became derailed and were injured or destroyed; the plaintiffs brought this action to recover damages for the injury and destruction:—*Held*, that the derailment was not shewn to have been the result of want of maintenance or of negligence on the part of the defendants.—*Semble*, that the defendants were not, under the order of the Board, bound to maintain and repair the diamond.—*Guelph and Goderich R.W. Co. v. Guelph Radial R.W. Co.* (1906), 5 Can. Ry. Cas. 180, and *Grand Trunk R.W. Co. v. United Counties R.W. Co.* (1908), 7 Can. Ry. Cas. 294, distinguished.—*Edmonton Street R.W. Co. v. Grand Trunk Pacific R.W. Co.* (1912), 7 D.L.R. 888, referred to.—*Held*, also, that the action was for injury sustained by reason of the construction or operation of a railway, and the statutory provisions limiting the time for bringing an action applied; the action not having been brought within a year, the plaintiffs were barred: sec. 306 of the Dominion Railway Act, R.S.C. 1906, ch. 37, and sec. 265 (1) of the Ontario Railway Act, R.S.O. 1914, ch. 185.—*Canadian Northern R.W. Co. v. Robinson*, [1911]

A.C. 739, distinguished. *Grand Trunk R.W. Co. v. Sarnia Street R.W. Co.*, 477.

2. *Level Highway Crossing — Injury to Person Attempting to Cross — Evidence — Negligence — Contributory Negligence — Findings of Jury — Form of Questions — Trial — Supplementary Findings — Absence of Warning — Failure to Ring Bell — Competence of Witnesses — Negating by Jury of Alleged Failure to Sound Whistle — Evidence of Person Injured — Contradiction — Denial of New Trial.*—At a dangerous level highway crossing of the lines of railway used by the Grand Trunk and Wabash companies, the plaintiff attempted to cross the tracks; he passed in front of a Wabash engine standing close to the sidewalk, and was struck by the engine of a Grand Trunk train, which he could not see approaching, and was injured. He brought this action, to recover damages for his injuries, against both companies; at the trial, the action was, as against the Wabash company, taken from the jury and dismissed. As against the Grand Trunk company, questions were left to the jury, in answer to which they found in writing: (1) that the plaintiff's injury was caused by the negligence of that company; (2) that the negligence was, "Did not sound proper warning." When the second answer was read in the court-room, the trial Judge asked, whether by "warning" the jury meant the bell or the whistle; the foreman answered "The

bell;" and the Judge added to the written answer the words "as to bell." Question (3) was: "Or was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?" There was no written answer to this question; in the court-room, the foreman said that the jury were satisfied that the plaintiff did not cause the accident by his own negligence, and the Judge put down the answer "No." No objection to this was taken by any one:—*Held*, that the case could not properly have been withdrawn from the jury; the trial and the findings were not altogether satisfactory, but there was some evidence to support the findings of negligence and absence of contributory negligence; and there should not be a new trial (MASTEN, J., *hæsitante*).—*Per* MEREDITH, C.J.C.P.:—The form of the questions submitted to the jury was embarrassing; and what took place when the verdict was rendered was not the most proper way of taking and recording the verdict, although no objection was made.—*Held, per Curiam*, that, while the jury must be taken to have negated the plaintiff's right to recover on the ground that the whistle was not sounded, that was different from a finding that the whistle *was* sounded; it may have meant that the failure to sound the whistle was not sufficiently proved.—*Held*, also, that a witness is qualified when it is shewn in any way that if the bell had rung he could have heard it:

if it is self-evident that the witness is not deaf, and if he is shewn in evidence in any way to have been in hearing distance, he is a competent witness, whatever may be the weight of his testimony.—The plaintiff, who was a foreigner, testified at the trial, through first one interpreter and then another; at one time he swore that when he passed the Wabash engine he looked both ways, and at another time he gave a different account:—*Held*, that all his statements must be submitted to the jury, and it was for the jury to say whether he took all proper care. *Jaroshinsky v. Grand Trunk R.W. Co.*, 111.

See MUNICIPAL CORPORATIONS, 1—NEGLIGENCE — NUISANCE—STREET RAILWAY.

RATIFICATION.

See COMPANY, 1.

RECEIVER.

See EXECUTION.

RECOGNIZANCES.

See CRIMINAL LAW, 1.

REFERENCE.

See WATER, 2.

REGISTRY LAWS.

See CONTRACT, 2 — MECHANICS' LIENS.

RESCISSION.

See FRAUD AND MISREPRESENTATION.

RESOLUTIONS.

See COMPANY, 1.

RESTITUTION.

See FRAUD AND MISREPRESENTATION.

RESTRAINT OF MARRIAGE.

See WILL, 3.

RESTRAINT OF TRADE.

See COVENANT.

REVIVAL.

See WILL, 2.

REVOCATION.

See WILL, 2.

RIPARIAN RIGHTS.

See WATER, 1.

RIVER.

See NUISANCE—WATER.

ROAD.

See HIGHWAY.

ROYALTIES.

See WILL, 5.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 350.]—See COMPANY, 4.

Rule 496.]—See APPEAL, 2.

Rule 498.]—See APPEAL, 2.

SALARIES OF JUDGES.

See ASSESSMENT AND TAXES, 3

SALE OF LAND.

See EVIDENCE — MORTGAGE—VENDOR AND PURCHASER.

SAVINGS BANK DEPOSIT.

See GIFT.

SCHOOLS.

Public Schools — Proposal of School Board to Purchase Site and Build School House—Money to be Raised upon Debentures — Public Schools Act, R.S.O. 1914, ch. 266, sec. 44—School Board Restrained from Purchasing until Approval of Ratepayers Obtained and Debentures Issued—Appeal to Inspector under sec. 54 (11)—Finality of Inspector's Decision.—Where a proposed new public school site and school building are not to be paid for out of the rates for one year, but out of money to be raised upon debentures under the provisions of sec. 44 of the Public Schools Act, R.S.O. 1914, ch. 266, it is necessary that the steps provided for in that section shall be taken. The school board has no power to create debts extending beyond the year without the sanction of the ratepayers and on debentures issued by the municipal council—the trustees cannot make a binding and unconditional contract to purchase or build until they are assured of the means to pay, through the issue of debentures. But the school board is not precluded from securing options on sites or from making contracts to buy conditional upon the lawful issue of the debentures necessary to provide the purchase-price.—*Smith v. Fort William School Board* (1893), 24 O.R. 366, and *Forbes v. Grimsby Public School Board* (1903), 6 O.L.R. 539, approved and applied to rural schools.—*Held* (RIDDELL, J., dissenting), that the defendants should be restrained from taking any action in pursuance of a re-

solution passed at a meeting of ratepayers, or otherwise proceeding towards a proposed purchase, unless and until the proposal for the raising of money by debentures had been submitted to and sanctioned at a further special meeting of the ratepayers, and until in pursuance thereof debentures had been duly issued.—Where the county public school inspector has heard and determined an appeal under the provisions of sec. 54 (11) of the Act, the jurisdiction of the Court is not thereby ousted.—*Arthur Roman Catholic Separate School Trustees v. Township of Arthur* (1891), 21 O.R. 60, approved.—*Per* MASTEN, J.:—The proceedings of the school board and the vote taken at the meeting of ratepayers were irregular and illegal; and there was no sanction for an application to the council. *Birch v. Public School Board of Section 15 in the Township of York*, 392.

See MECHANICS' LIENS.

SEARCH-WARRANT.

See CANADA TEMPERANCE ACT.

SECURITY.

See APPEAL, 3 — ASSIGNMENTS AND PREFERENCES — BANKS AND BANKING.

SERVANT.

See MASTER AND SERVANT.

SESSIONS.

See CRIMINAL LAW, 1.

SET-OFF.

See HIGHWAY — MORTGAGE.

SEWER.

See MUNICIPAL CORPORATIONS, 2.

SHARES.

See EXECUTION — WILL, 5.

SOLICITOR.

Investment of Money of Client — Undertaking to Assume Investment and Repay Money—Failure to Implement — Negligence — Misconduct — Penalty — Application to Strike off Roll.—Negligence on the part of a solicitor may not amount to misconduct; and, while a solicitor's undertaking will be enforced by the Court, the extreme penalty of striking the solicitor off the roll will not be inflicted unless misconduct is shewn. Failure to implement an undertaking is not necessarily misconduct.—In the circumstances of this case, the solicitor was *held*, to have incurred only the minor penalty of being summarily ordered to perform his undertaking.—*United Mining and Finance Corporation Limited v. Becher*, [1910] 2 K.B. 296, [1911] 1 K.B. 840, specially referred to. *Re Solicitor*, 310.

See JUDGMENT, 2.

SPECIFIC PERFORMANCE.

See EVIDENCE — VENDOR AND PURCHASER, 3.

STATUTE OF FRAUDS.

See VENDOR AND PURCHASER, 1.

STATUTES.

55 Vict. ch. 99 (O.) (Toronto Railway Company's Act).

See STREET RAILWAY, 1.

R.S.O. 1897, ch. 51, sec. 58 (10) (Judicature Act).

See NUISANCE.

R.S.C. 1906, ch. 1, sec. 34 (20) (Interpretation Act).

See COMPANY, 4.

R.S.C. 1906, ch. 37, sec. 306 (Railway Act).

See RAILWAY, 1.

R.S.C. 1906, ch. 119, sec. 181 (Bills of Exchange Act).

See PROMISSORY NOTE.

R.S.C. 1906, ch. 144, sec. 70 (Winding-up Act).

See COMPANY, 3.

R.S.C. 1906, ch. 144, secs. 108, 117, 119.

See COMPANY, 4.

R.S.C. 1906, ch. 145, secs. 9, 10, 11 (Canada Evidence Act).

See CRIMINAL LAW, 3.

R.S.C. 1906, ch. 146, sec. 30 (Criminal Code).

See NEW TRIAL.

R.S.C. 1906, ch. 146, secs. 226, 228, 749, 750, 797.

See CRIMINAL LAW, 1.

R.S.C. 1906, ch. 146, secs. 774, 791, 852, 1124.

See CRIMINAL LAW, 2.

R.S.C. 1906, ch. 146, sec. 1019.

See CRIMINAL LAW, 3.

R.S.C. 1906, ch. 152 (Canada Temperance Act).

See CANADA TEMPERANCE ACT, 2.

R.S.C. 1906, ch. 152, secs. 117 (c), 117 (2), 137.

See CANADA TEMPERANCE ACT, 1.

6 Edw. VII. ch. 55, sec. 18 (O.) (University Act).

See MISTAKE.

7 & 8 Edw. VII. ch. 71, sec. 1 (D.) (Amending Canada Temperance Act).

See CANADA TEMPERANCE ACT, 1.

8 & 9 Edw. VII. ch. 9 (D.) (Amending Criminal Code).

See CRIMINAL LAW, 2.

3 & 4 Geo. V. ch. 13, sec. 28 (D.) (Amending Criminal Code).

See CRIMINAL LAW, 1.

3 & 4 Geo. V. ch. 99, sec. 88 (D.) (Bank Act).

See BANKS AND BANKING.

3 & 4 Geo. V. ch. 2 (O.) (Act respecting the Revision and Consolidation of the Statutes of Ontario).

See CONSTITUTIONAL LAW.

3 & 4 Geo. V. ch. 43, sec. 325 (O.) (Municipal Act).

See MUNICIPAL CORPORATIONS, 2.

R.S.O. 1914, ch. 35, secs. 27, 29, 31, 32 (Public Works Act).

See HIGHWAY.

R.S.O. 1914, ch. 56, secs. 32 (2), (3), 119 (Judicature Act).

See COURTS.

R.S.O. 1914, ch. 56, sec. 140 *et seq.*

See EXECUTION.

R.S.O. 1914, ch. 62, sec. 33 (Surrogate Courts Act).

See SURROGATE COURTS.

R.S.O. 1914, ch. 63, secs. 79 (2), 104, 123, 226 (Division Courts Act).

See DIVISION COURTS.

R.S.O. 1914, ch. 68, secs. 3, 6, 7, 10 (Lunacy Act).

See LUNATIC, 2.

R.S.O. 1914, ch. 68, sec. 11 (d).

See LUNATIC, 1.

R.S.O. 1914, ch. 71, secs. 7, 8, 9 (Libel and Slander Act).

See LIBEL.

R.S.O. 1914, ch. 80, secs. 10, 11 (Execution Act).

See VENDOR AND PURCHASER, 3.

R.S.O. 1914, ch. 80, sec. 12 *et seq.*

See EXECUTION.

R.S.O. 1914, ch. 89, sec. 13 (Public Authorities Protection Act).

See STREET RAILWAY, 2.

R.S.O. 1914, ch. 102, sec. 5 (Statute of Frauds).

See VENDOR AND PURCHASER, 1.

R.S.O. 1914, ch. 105, sec. 3 (Fraudulent Conveyances Act).

See BILLS OF SALE AND CHATTEL MORTGAGES.

R.S.O. 1914, ch. 109, secs. 2, 7 (Conveyancing and Law of Property Act).

See LAND TITLES ACT.

R.S.O. 1914, ch. 120, secs. 2 (e), 23 25 (Wills Act).

See WILL, 2.

R.S.O. 1914, ch. 120, sec. 20 (3).

See DISTRIBUTION OF ESTATES.

R.S.O. 1914, ch. 124 (Registry Act).

See CONTRACT, 2.

R.S.O. 1914, ch. 126, sec. 54 (4) (Land Titles Act).

See LAND TITLES ACT.

R.S.O. 1914, ch. 126, sec. 62 (1).

See VENDOR AND PURCHASER, 3.

R.S.O. 1914, ch. 130, sec. 4 (Rivers and Streams Act).

See WATER, 2.

R.S.O. 1914, ch. 133, secs. 21, 23 (Bills of Sale and Chattel Mortgage Act).

See BILLS OF SALE AND CHATTEL MORTGAGES.

R.S.O. 1914, ch. 134, secs. 25 (4), 27 (Assignments and Preferences Act).

See ASSIGNMENTS AND PREFERENCES.

R.S.O. 1914, ch. 140, secs. 2 (c), 3, 16, 22 (2) (Mechanics' and Wage-Earners Lien Act).

See MECHANICS' LIENS.

R.S.O. 1914, ch. 147, secs. 3 (1), 4 (Apprentices and Minors Act).

See INFANTS, 1.

R.S.O. 1914, ch. 178, secs. 15, 92, 95 (Companies Act).

See COMPANY, 1.

R.S.O. 1914, ch. 178, secs. 23 (1) (k), 210.

See COMPANY, 2.

R.S.O. 1914, ch. 183, sec. 166 (7), (9), (10), (11) (Insurance Act).

See INSURANCE, 4.

R.S.O. 1914, ch. 183, sec. 194, condition 6 (a).

See INSURANCE, 2.

R.S.O. 1914, ch. 183, sec. 194, conditions 18, 20.

See INSURANCE, 3.

R.S.O. 1914, ch. 185, sec. 265 (Railway Act).

See STREET RAILWAY, 2.

R.S.O. 1914, ch. 185, sec. 265 (1).

See RAILWAY, 1.

R.S.O. 1914, ch. 186, secs. 9, 52 (Ontario Railway and Municipal Board Act).

See HIGHWAY.

R.S.O. 1914, ch. 192 (Municipal Act).

See ASSESSMENT AND TAXES, 1.

R.S.O. 1914, ch. 192, sec. 325.

See MUNICIPAL CORPORATIONS, 2.

R.S.O. 1914, ch. 192, sec. 325 (4).

See MUNICIPAL CORPORATIONS, 3.

R.S.O. 1914, ch. 192, sec. 400 (45).

See MUNICIPAL CORPORATIONS, 1.

R.S.O. 1914, ch. 192, sec. 460 (2).

See STREET RAILWAY, 2.

R.S.O. 1914, ch. 193, secs. 12, 47 (Local Improvement Act).

See ASSESSMENT AND TAXES, 2.

R.S.O. 1914, ch. 195, sec. 5 (15) (Assessment Act).

See ASSESSMENT AND TAXES, 3.

- R.S.O. 1914, ch. 195, secs. 5, 6.
See ASSESSMENT AND TAXES, 2.
- R.S.O. 1914, ch. 195, secs. 85-93, 233.
See ASSESSMENT AND TAXES, 1.
- R.S.O. 1914, ch. 204, sec. 29 (Public Utilities Act).
See STREET RAILWAY, 2.
- R.S.O. 1914, ch. 207, sec. 19 (Motor Vehicles Act).
See MOTOR VEHICLES ACT.
- R.S.O. 1914, ch. 215, sec. 141 (Liquor License Act).
See CONSTITUTIONAL LAW.
- R.S.O. 1914, ch. 231, secs. 14, 27 (Children's Protection Act).
See INFANTS, 1.
- R.S.O. 1914, ch. 266, secs. 44, 54 (11) (Public Schools Act).
See SCHOOLS.
- R.S.O. 1914, ch. 266, secs. 55, 73.
See MECHANICS' LIENS.
- R.S.O. 1914, ch. 280, sec. 10 (Upper Canada College Act).
See ASSESSMENT AND TAXES, 2.
- 4 Geo. V. ch. 36, sec. 3 (O.) (Amending Motor Vehicles Act).
See MOTOR VEHICLES ACT.
- 4 Geo. V. ch. 37, sec. 5 (O.) (Amending Liquor License Act).
See CONSTITUTIONAL LAW.
- 5 Geo. V. ch. 18, sec. 10 (O.) (Toronto and Hamilton Highway Commission Act).
See HIGHWAY.
- 5 Geo. V. ch. 39, sec. 33 (O.) (Amending Liquor License Act).
See CONSTITUTIONAL LAW.
- 6 Geo. V. ch. 35, sec. 6 (O.) (Amending Companies Act).
See COMPANY, 2.
- 6 Geo. V. ch. 36 (O.) (Amending Insurance Act).
See INSURANCE, 4.

STAY OF EXECUTION.

See APPEAL, 2.

STREET RAILWAY.

1. *Agreement with City Corporation* — 55 Vict. ch. 99 (O.) — *Construction and Effect* — *Exclusive Right to Operate upon Streets* — *Exception* — *Restriction* — *Expiry of Franchise of another Railway* — *Right to Operate upon Por-*

tion of Street Released.] — *Held*, by the Judicial Committee, affirming the judgment in *Re Toronto R.W. Co. and City of Toronto* (1915), 34 O.L.R. 456, that, upon the proper construction of the agreement made between the parties in 1891 and validated by 55 Vict. ch. 99 (O.), the Toronto Railway Company had the right, from and after the 25th June, 1915, when the rights of the Metropolitan Street Railway Company ceased, to operate upon the portion of Yonge street from the Canadian Pacific Railway tracks to the north limit of the city of Toronto. — Section 1 of the validating statute explained and its language reconciled with the conditions expressed in the agreement itself. — *Toronto R.W. Co. v. Toronto Corporation*, [1906] A.C. 117, referred to as not governing this case. — The judgment of the Court of Appeal in *City of Toronto v. Toronto R.W. Co.* (1905), 5 O.W.R. 130, approved. *City of Toronto v. Toronto R.W. Co.*, 470.

2. *Injury to Vehicle on Highway* — *Railway Owned and Operated by Municipal Corporation* — *Negligence* — *Nuisance* — “*Construction and Operation of Railway*” — *Limitation of Time for Bringing Action* — *Municipal Act*, sec. 460 (2) — *Public Utilities Act*, sec. 29 — *Public Authorities Protection Act*, sec. 13 — *Ontario Railway Act*, sec. 265 — *Notice of Claim* — *Sufficiency.*] — A car operated on a street railway owned by the defendants ran into and injured the plaintiff's automobile, which had

become stalled in crossing the track owing to the improper construction of the track and roadway; and the plaintiff brought this action, more than six months but less than a year after the occurrence, to recover damages for the injury:—*Held*, upon the evidence, that the defendants were guilty of negligence which caused the injury, and that the plaintiff was not guilty of contributory negligence.—On the day of the injury, the plaintiff's solicitor wrote a letter, on behalf of the plaintiff, to the city corporation, making a claim for damages "for the smashing of" the plaintiff's "automobile by car number 46 on Cumberland street north this morning." The defendants, after two weeks' delay, answered that there was no negligence, and they could not consider the claim:—*Held*, that the notice was sufficient, if notice was necessary.—*Held*, also, that the various limitations of time for bringing an action—imposed by sec. 460 (2) of the Municipal Act, R.S.O. 1914, ch. 192; sec. 29 of the Public Utilities Act, R.S.O. 1914, ch. 204; and sec. 13 of the Public Authorities Protection Act, R.S.O. 1914, ch. 89—had no application to this action.—In constructing the road a nuisance was created, and had ever since continued; this action was for damages for the injury sustained by reason of the improper construction and operation of the railway; and fell expressly within sec. 265 of the Ontario Railway Act, R.S.O. 1914, ch. 185. *Kuusisto v. City of Port Arthur and Public Utili-*

ties Commission of Port Arthur, 146.

See RAILWAY, 1.

SUCCESSION.

See DISTRIBUTION OF ESTATES.

SUPERSTITIOUS USE.

See WILL, 4.

SUPREME COURT OF ONTARIO.

See APPEAL — COURTS—SURROGATE COURTS.

SURROGATE COURTS.

Testamentary Cause — Issue as to Validity of Will—Removal into Supreme Court of Ontario — Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 33 — Value of Property of Deceased Testator Domiciled in Ontario — Real and Personal Property out of the Province — Inclusion of—Property Affected by Result of Action—Proof of Law of Foreign Country.—Section 33 of the Surrogate Courts Act, R.S.O. 1914, ch. 62, permits the removal of a testamentary cause from a Surrogate Court into the Supreme Court of Ontario only when the property of the deceased exceeds \$2,000 in value:—*Held*, that that does not mean property in Ontario only, but all property of the deceased which may be affected by the result of the action.—And where the property in Ontario of a deceased person domiciled in Ontario was valued at about \$100 only, but his property in the State of Massachusetts (mostly realty) was valued at much more than

\$2,000, an action in a Surrogate Court, in which a grant of probate of his will was sought and opposed, and a real question as to the validity of the will was involved, was removed into the Supreme Court, it being proved as a fact that, by the law of Massachusetts, where probate of a will has been granted by the proper Court in the country of the deceased's domicile, and application is subsequently made for probate in Massachusetts, it is not open to any one desiring to oppose the granting of probate in Massachusetts, to contest the will. *Re Newcombe v. Evans*, 354.

See DISTRIBUTION OF ESTATES.

SURVIVORSHIP.

See GIFT.

TAXES.

See ASSESSMENT AND TAXES—MISTAKE.

TESTAMENTARY CAPACITY.

See WILL, 1.

THEFT.

See MOTOR VEHICLES ACT.

TIME.

See MECHANICS' LIENS—WILL, 4.

TORT.

See DAMAGES.

TOTAL DISABILITY.

See INSURANCE, 1.

TRADE MARK.

Infringement — Colourable Imitation — Trade Name — Intent to Deceive — Passing off — Evidence — Actual Case not Proved — Laches and Acquiescence — Abandonment — Long User by Others — Fraud — Injunction — Damages.]—In an action to restrain the defendant from infringing trade marks claimed by the plaintiff company with respect to playing cards, it appeared that the registration took place in 1906, but that the marks had been in use many years previously:—*Held*, upon the evidence, that the defendant and an English firm, who manufactured playing cards, conspired to defraud the plaintiff company of its trade name and of the profits legitimately its, as the result of its advertising and enterprise.—The trade mark existed independently of any registration; and the plaintiff company was entitled to succeed, not only by virtue of the trade mark, but because a plain case of passing off had been made out.—Where the intention to pass off is abundantly proved, and the goods are put up in such an imitative form as to make the passing off easy, it is not essential that an actual case of passing off should be proved.—The plaintiff company had not, by acquiescence and laches, abandoned its trade marks, nor had they become *publici juris*. Long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction; and here there was no sufficient evidence of acquiescence to constitute an aban-

donment. — *Ford v. Foster* (1872), L.R. 7 Ch. 611, and *National Starch Manufacturing Co. v. Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275, referred to.—An injunction and damages were awarded to the plaintiff company. *United States Playing Card Co. v. Hurst*, 85.

TRESPASS.

See *WATER*, 1.

TRIAL.

See *CRIMINAL LAW* — *DIVISION COURTS* — *NEW TRIAL* — *RAILWAY*, 2.

TRUST COMPANY.

See *LUNATIC*, 1.

TRUSTS AND TRUSTEES.

See *COMPANY*, 1 — *WILL*, 3, 5.

TUTOR.

See *INFANTS*, 2.

UNDERTAKING.

See *SOLICITOR*.

UNDUE INFLUENCE.

See *WILL*, 1.

UNIVERSITY ACT.

See *MISTAKE*.

UPPER CANADA COLLEGE.

See *ASSESSMENT AND TAXES*, 2.

VALUING SECURITY.

See *ASSIGNMENTS AND PREFERENCES*.

VEHICLES.

See *MOTOR VEHICLES ACT* — *STREET RAILWAY*, 2.

VENDOR AND PURCHASER.

1. *Agreement for Exchange of Properties* — *Difference in Value* — *Payment in "Negotiable Paper or Cash"* — *Uncertainty as to Terms* — *Incompleteness* — *Oral Evidence* — *Admissibility* — *Enforcement of Agreement* — *Statute of Frauds*, R.S.O. 1914, ch. 102, sec. 5.]—By a written agreement for the exchange of properties between the plaintiff and defendant, the plaintiff was to pay to the defendant the excess in value over the plaintiff's property of the defendant's property, in "negotiable paper" or cash:—*Held*, that the words quoted had no absolute fixed meaning; parol evidence to explain the position of the parties and of the subject-matter and surroundings was admissible.—*Bank of New Zealand v. Simpson*, [1900] A.C. 182, 187, followed.—Having regard to the evidence, the "paper" contemplated was something held by the plaintiff on which another was liable or which was secured substantially as by mortgage on land—the mere promissory note of the plaintiff would not be sufficient; in so far as the plaintiff was unable to supply proper and substantial "negotiable paper," he was to pay cash.—The terms were reasonably certain, and the defendant was entitled to enforce the agreement as against the Statute of Frauds.—There is a growing inclination in the Courts to carry out contracts which are complete so far as essentials are concerned, and yet leave something (e.g., as to manner of payment) to be adjusted between

the parties.—*Reynolds v. Foster* (1912-13), 23 O.W.R. 613, 933, 4 O.W.N. 448, 694, not followed. *McDonald v. Murray* (1883-85), 2 O.R. 573, 11 A.R. 101, and *Ozd v. Coombes* (1884), 28 Sol. J. 378, followed. *Martin v. Jarvis*, 269.

2. *Agreement for Sale of Land — Breach by Purchaser — Resale by Vendor with Assent of Purchaser — Damages — Deficiency on Resale — Expenses of Resale—Interest and other Charges.*—The defendant refused to carry out an agreement for the purchase of a house and land from the plaintiff; the plaintiff resold at a lower price; the difference in price was compensated by the plaintiff retaining a sum paid by the defendant as a deposit; but the plaintiff claimed, in addition, a sum made up of agents' commission upon and expenses of the resale and interest, etc.:—*Held*, that the resale was made with the defendant's assent and upon his account, upon an agreement that the rights of the parties to the first sale should be adjusted on the basis of the first agreement; and the damages awarded by the trial Judge (the difference in price, the expenses of resale and an allowance for interest, insurance, and taxes) were just the sum coming to the plaintiff upon such an adjustment. As the plaintiff cleared the property of tenants, and held it ready for the defendant from the day he was to have had possession until the second sale, the vendor was entitled to interest for non-payment of the purchase-money over and above the amount of

the mortgages. *Evans v. Farah*, 79.

3. *Agreement for Sale of Land — Judgment for Specific Performance — Objections to Title — Incumbrances—Restrictive Building Conditions — Execution against Lands of Vendor — Execution Act, secs. 10, 11 — Land Titles Act, sec. 62 (1)—Costs.*—Specific performance of a contract for the sale and purchase of land having been awarded in favour of the plaintiff, the purchaser, by the judgment reported in 35 O.L.R. 9, the question whether the defendant, the vendor, could convey the land to the plaintiff in fee simple, free from incumbrance, came before the Court for determination:—*Held*, that the restrictive building conditions with which the land was burdened, having been originally set up, unsuccessfully, by the plaintiff, as a ground for escaping from the contract, and a judgment for specific performance having been taken, the plaintiff could not again set them up as a reason why the defendant could not convey free from incumbrances.—A writ of *fi. fa.* against the goods and lands of the defendant was placed in the sheriff's hands for execution after the contract was made, but at a time when the greater part of the purchase-money was unpaid:—*Held*, that the plaintiff could not be compelled to take the land until the effect of the *fi. fa.* was removed.—*Parke v. Riley* (1866), 3 E. & A. 215, explained. *Robinson v. Moffatt*, 52.

See EVIDENCE.

VOLUNTARY BESTOWMENT.*See* GIFT.**VOLUNTARY PAYMENT.***See* MISTAKE.**WARRANT.***See* NEW TRIAL.**WARRANTY.***See* INSURANCE, 1.**WATER.**

1. *Mill-site — Riparian Rights — Dam — Raceway — Obstruction to Flow of Water — Trespass — Damages — Easement — Construction of Deeds — Severance of Tenement — Dominant and Servient Tenements.*—The common grantor of the plaintiffs and defendants was the owner of a mill property upon a river. His land included a portion of the bed of the river, subject to a reservation by the Crown of the bed of navigable waters. By means of a dam, a mill-pond was created, and a raceway was cut through the flats under the bank of the river. The conveyance to the plaintiffs was the earlier one; it included the mill property and two portions of the raceway—the upper part, comprising the intake, and the lower part, through which the mill was fed. The flats retained and afterwards conveyed to the defendants included part of the channel of the raceway, dependent as to the flow of water upon the upper part being kept open. The plaintiffs constructed a dam and placed obstructions at the head of the raceway and made a road lead-

ing to a street; these were removed by the defendants; and this action was brought, in respect of that trespass and other trespasses, for a declaration of right, an injunction, and damages:—*Held*, that the defendants were not entitled to the uninterrupted flow of the water through the raceway as it existed when the conveyance to the plaintiffs was made. The common grantor never used the raceway for the purposes of boating, but only for his mill; the right (if any) reserved when he conveyed to the plaintiffs must be determined by the use actually adopted before the grant; and the inference was, that he granted the easement or quasi-easement which the prior user indicated—the flow of the water for mill purposes—to the plaintiffs, if they chose to assert it; that being so, the grantees had the right to terminate the easement, which they did by closing up both ends of the raceway. The raceway was not formed for the use of the portion retained, but for the mill property, and the severance was of such a nature as to indicate a destruction of the raceway so far as it formed a continuous and used channel. The portion of the land conveyed to the plaintiffs was the dominant tenement; and the defendants had no easement over or right in respect of it.—*Wheel-don v. Burrows*, (1879), 12 Ch.D. 31, and *Burrows v. Lang*, [1901] 2 Ch. 502, specially referred to.—Section 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, considered. *St.*

Mary's Milling Co. v. Town of St. Mary's, 546.

2. *Rights of Lumbermen Floating Logs in Navigable River — Injury to Dam — "Unnecessary Damage" — Rivers and Streams Act, R.S.O. 1914, ch. 130, sec. 4 — Negligence — Damages — Reference — Costs.*]—The judgment of MIDDLETON, J., 34 O.L.R. 204, was reversed; GARROW and MACLAREN, JJ.A., dissenting; and the plaintiffs were held, entitled to recover damages sustained by them owing to the destruction of their coffer-dam by the defendant's logs.—The rights conferred by the Rivers and Streams Act were subordinate to the right to maintain the dam; and the provisions of sec. 4 could not cut down or impair that paramount right. The damage that was done was an unnecessary damage within the meaning of that section.—The statute includes damage unnecessarily caused during the normal and usual process of driving, as well as that which arises, though inevitably, from a method of operation originally improper, unnecessary, or negligent. *Lowery and Goring v. Booth*, 17.

See CONTRACT, 2 — NUISANCE.

WAY.

See HIGHWAY.

WILL.

1. *Action to Set aside — Want of Testamentary Capacity — Undue Influence — Evidence — Findings of Trial Judge — Reversal on Appeal — Costs.*]—Held,

reversing the judgment of MEREDITH, C.J.C.P., 35 O.L.R. 264, that the plaintiff, upon the evidence, had failed to shew that the will of his father was procured by the defendant his brother, or that there was any lack of testamentary capacity in the father. — The defendants' appeal from the judgment was allowed with costs thereof to be paid by the plaintiff; the plaintiff's costs, as between party and party, up to and inclusive of the judgment, and the defendants' costs, as between solicitor and client, up to the same point, were ordered to be paid out of the estate.—*Wilson v. Bassil*, [1903] P. 239, followed. *Lloyd v. Robertson*, 498.

2. *Codicils—Revocation — Revival — Wills Act, R.S.O. 1914, ch. 120, secs. 2 (e), 23, 25.*]—The testator, who died in 1916, had duly executed six testamentary writings, which were all in existence and un mutilated at the time of his death: The first was a will made in May, 1909; the second, a codicil made in December, 1909; the third, a codicil made in September, 1910; the fourth, a will made in 1913, which revoked the first, second, and third; the fifth and sixth, codicils made in 1915, purporting to be codicils to the will of 1909, ignoring the will of 1913, which the testator, an aged man, though of undoubted testamentary capacity, had perhaps forgotten:—Held, that the will of 1909 and its codicils of 1909 and 1910, having been revoked by the will of 1913, were revived by the codicils of 1915, which in

express terms confirmed the earlier will, one referring to it by date, and the other (the last) speaking of it as "my said will and the three codicils I have made thereto," while making no mention of the will of 1913; and accordingly probate of the will of 1909 and its four codicils was granted.—Sections 2 (e), 23, and 25 of the Wills Act, R.S.O. 1914, ch. 120, considered.—*In the Goods of May* (1868), 1 P. & D. 581, *In the Goods of Wilson* (1868), *ib.* 582, and *McLeod v. McNab*, [1891] A.C. 471, 476, referred to. *Findlay v. Pae*, 318.

3. *Construction — Real and Personal Estate Given to Executors upon Trust — Residuary Gift in Favour of Sister — Gift over of "Unused or Unexpended Balance" — Absolute Interest Cut down to Life Interest — Condition in Restraint of Marriage — Invalidity — Mixed Fund — "Revert" — Encroachment upon Capital for Maintenance of Sister — Enjoyment of Money and other Things in Specie — Insurance Moneys.*—The testator by his will gave all his estate, which consisted of both realty and personalty and was valued at about \$19,000, to his executors in trust (first) to pay debts and two pecuniary legacies and to hand over certain specific chattels to named persons. Then followed this clause: "To my sister," naming her, "I leave all the residue of my estate. On the decease of my sister . . . the unused or unexpended balance shall revert to the Odd Fellows Home. . . . In the event of the marriage of

my sister . . . all the residue hereinbefore bequeathed to her shall go the Odd Fellows Home. . . ." In an earlier clause, the testator desired that his sister should repay to an Odd Fellows Lodge of which he was a member "all sick benefits said Lodge has paid to me, in case my sister feels able so to do:"—*Held*, that the weight of authority and the manifest intention of the testator to benefit the Odd Fellows, as well as his sister, led to the conclusion that the apparently absolute gift to the sister should be cut down to a life estate.—*Constable v. Bull* (1849), 3 DeG. & S. 411, and *Philson v. Stevenson* (1903), 37 Ir. L.T.R. 104, 225, specially referred to.—*Held*, also, that the condition as to marriage, being in general restraint of marriage, was void; and the rule applies to mixed funds and to real and personal estate given together.—*Lloyd v. Lloyd* (1852), 2 Sim. N.S. 255, 263, *Bellairs v. Bellairs* (1874), L.R. 18 Eq. 510, 516, and *Duddy v. Gresham* (1878), 2 L.R. Ir. 442, 465, followed.—The different operation of rules of construction and rules of law pointed out. "Revert" is a flexible term, and in this will might be read as meaning "turn back."—*Held*, also, upon consideration of the words "the unused or unexpended balance," that the capital might and should be encroached upon for the purpose of the sister's proper maintenance—she not being resident in Ontario, where were the testator's domicile and estate—but for no other purpose.—*Re John-son* (1912), 27 O.L.R. 472, and

In re Thomson's Estate (1880), 14 Ch.D. 263, followed.—The sister was entitled in specie to the money and other articles *quæ ipso usu consumuntur* forming part of the estate.—*In re Tuck* (1905), 10 O.L.R. 309, followed.—The proceeds of a life insurance policy should be treated as money. *Re Cutter*, 42.

4. *Residuary Gift of Mixed Fund to Church* — *Masses for Repose of Soul of Testator and Descendants for ever* — *Superstitious Use* — *Perpetuity* — *Charitable Use* — *Limitation to Personality* — *Originating Notice* — *Time for Realising Residue not Arrived* — *Costs.*]—A bequest for the saying of masses for the repose of souls is not in this Province void as superstitious.—*Elmsley v. Madden* (1871), 18 Gr. 386, followed.—A bequest of the residue of the testator's estate (consisting of both realty and personalty) to a church, "to be invested and kept invested . . . for ever and the interest . . . to be applied and expended . . . for the saying of Holy Masses . . . for the repose of the soul of the testator and his descendants for ever," was held, ineffective as creating or tending to create a perpetuity, and not a charitable use.—*O'Hanlon v. Logie*, [1906] 1 I.R. 247, not followed.—*West v. Shuttleworth* (1835), 2 My. & K. 684, and *Heath v. Chapman* (1854), 2 Drew. 254, followed.—*Semble*, that in any case the personalty alone would have been applicable to the trust declared.—The questions arising upon the

will were (in the absence of objection) considered upon an originating notice notwithstanding that the time had not come for realising the residue.—*In re Staples*, [1916] 1 Ch. 322, followed.—Costs of all parties as between solicitor and client were allowed out of the estate.—*In re Hall-Dare*, [1916] 1 Ch. 272, followed. *Re Zeagman*, 536.

5. *Trust* — *Bequest of Income* — *Royalties upon Sales of Books* — *Apportionment between Capital and Income* — *Unmarketed Company-shares* — *Apportionment of Proceeds when Sale Effected.*]—A testator, after making provision for his wife, gave her a general power of appointment over his whole estate. He died in 1898; and his widow, dying in 1899, by her will, in the exercise of the power of appointment, directed the executors of her husband to transfer the estate to trustees upon trust, "to set apart and invest the residue of the said estate and to pay the income and interest thereof to" her two sisters, and upon their death to deal with the residue in the way pointed out by the will. The testator was the author of certain books which had been copyrighted. Under agreements made by him with publishers, royalties were payable to him and his estate from time to time upon sales made. The trustees received these royalties for fifteen years, and treated them as capital, paying the income to the sisters:—*Held*, by MIDDLETON, J., that the amounts so received should be apportioned

between capital and income in the proportion that capital would bear to an assumed income at five per cent., with yearly rests, from the testator's death.—The rule in *In re Earl of Chesterfield's Trusts* (1883), 24 Ch.D. 643, applied.—*Davidson's Trustees v. Ogilvie*, [1910] Sess. Cas. 294, not followed.—Upon appeal, a Court composed of four Judges was divided in opinion upon the question of the application of the rule to the royalty payments, and the judgment of MIDDLETON, J., stood affirmed.—The same rule was applied by MIDDLETON, J., as to the division of the proceeds (when realised) of company-shares not sold but retained by the trustees because not at the time marketable; and this was affirmed by the appellate Court. *Re Kirkland*, 569.

See CHARGE ON LAND — DISTRIBUTION OF ESTATES — INFANTS, 2 — SURROGATE COURTS.

WINDING-UP.

See COMPANY, 3, 4.

WITNESSES.

See CRIMINAL LAW, 3 — RAILWAY, 2.

WORDS.

"Action."—See COMPANY, 4.

"Advances."—See COMPANY, 2.

"Arrears of Salary or Wages."—See COMPANY, 3.

"Construction or Operation of the Railway."—See RAILWAY, 1 — STREET RAILWAY, 2.

"Clerk or other Person."—See COMPANY, 3.

"Company in Ontario."—See EXECUTION.

"Continuing Security."—See PROMISSORY NOTE.

"Direct Loss or Damage by Fire."—See INSURANCE, 2.

"Disorderly House."—See CRIMINAL LAW, 2.

"Employ."—See MOTOR VEHICLES ACT.

"Fair Comment."—See LIBEL.

"Flue, Stack or Chimney."—See MUNICIPAL CORPORATIONS, 1.

"House of Ill-fame."—See CRIMINAL LAW, 2.

"Imperial."—See ASSESSMENT AND TAXES, 3.

"Judge of Co-ordinate Authority."—See COURTS.

"Keepers."—See CRIMINAL LAW, 1.

"Municipality in which no Tavern or Shop License is Issued."—See CONSTITUTIONAL LAW.

"Negotiable Paper or Cash."—See VENDOR AND PURCHASER, 1.

"Operation of the Railway."—See RAILWAY, 1 — STREET RAILWAY, 2.

"Person."—See COMPANY, 4.

"Prior Known Decision."—See COURTS.

"Property Owned by any other Person."—See INSURANCE, 2.

"Revert."—See WILL, 3.

"Stolen it from the Owner."—See MOTOR VEHICLES ACT.

"Subject to the State of Account."—See LAND TITLES ACT.

"Substantial Wrong or Mis-carriage."—See CRIMINAL LAW, 3.

"Taxation."—See ASSESSMENT AND TAXES, 2.

"Total Disability."] — See INSURANCE, 1.

"Unnecessary Damage."—See WATER, 2.

"Unused or Unexpended Balance."—See WILL, 3.

WORK AND LABOUR.

See CONTRACT, 1 — MECHANICS' LIENS.



